IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1926
Nos. 287 and 286

No. 287

CHRYSLER SALES CORPORATION,

Plaintiff and Appellant,

v.

W. STANLEY SMITH, Commissioner of Insurance of the State of Wisconsin,

Defendant and Appellee.

No. 286

CLARK MOTOR COMPANY,

Plaintiff and Appellant,

v.

W. STANLEY SMITH as Commissioner of Insurance of the State of Wisconsin,

Defendant and Appellee.

BRIEF OF RESPONDENT, W. STANLEY SMITH, Commissioner of Insurance of Wisconsin

Explanation—Appellant's brief not having been served, this brief is prepared more in the nature of a general discussion of the legal principles raised in the pleadings and in the arguments in the lower court than as a reply to appellant's brief in this court so we may not follow the same order of discussion as appellant's brief and may add something in reply at the close of this brief if we think necessary.

STATEMENT OF FACTS

This is an appeal from an order denying to plaintiff a temporary injunction enjoining the defendant Insurance Commissioner of Wisconsin from enforcing the provisions of the insurance laws of Wisconsin against the appellant and its associated companies and their method of doing business in Wisconsin, which respondent claims includes the doing of insurance business in W[illegible]nsin, and delivering insurance policies in Wisconsin in violation of the statutes of the state, because neither the insurance company nor its agents were licensed under the laws of Wisconsin, and because the policies were not issued through and signed by such a licensed agent in Wisconsin as required by the statutes of the state.

Appellant claims, first, that its method of doing business in Wisconsin is not doing an insurance business in the state in violation of its laws and, second, if it is, then it claims that such laws are unconstitutional and void.

This scheme of doing business involves a number of corporations.

The Chrysler Corporation is a corporation organized under the laws of Delaware, and manufactures Chrysler automobiles in Michigan, Ohio and Indiana (T. R. 7).

It is the manufacturing corporation.

The Chrysler Sales Corporation is a corporation organized under the laws of Michigan with its principal office at Highland Park in that state, and it buys all the Chrysler automobiles manufactured by that company and sells them to dealers throughout the United States (T. R. 7).

It is the wholesale selling corporation.

The Commercial Credit Company is a corporation organized under the laws of Maryland with its principal office at Baltimore, and it purchases all the conditional sales contracts on Chrysler automobiles sold on credit or part payment. Such contracts are

a lien on the automobile sold for the unpaid purchase price. It is the financing corporation.

The Clark Motor Company is a corporation organized under the laws of Wisconsin, and buys Chrysler automobiles at wholesale from Chrysler Sales Corporation and sells them at retail to purchasers in Wisconsin, and with each sale it is required to and does sell insurance covering the automobile in favor of all interests in the automobile as they may appear. It reports each sale made so that an insurance policy can be issued and delivered to the purchaser.

It is the retail sales corporation.

The Palmetto Fire Insurance Company is an insurance corporation organized under the laws of South Carolina and is licensed to do insurance business in Michigan but not in Wisconsin (T. R. 9). Under a so-called master policy of insurance (T. R. 38) issued to Chrysler Sales Corporation, dated August 4, 1925, it agreed to insure all Chrysler automobiles sold under this so-called Chrysler plan and to issue and send by mail to each purchaser at retail of a Chrysler automobile when notified of such sale, a so-called certificate of insurance (T. R. 50) which is in effect an insurance policy on the particular automobile in favor of the persons or corporations interested in the automobile as their interests may appear at the time of loss, if any.

It is the insurance corporation.

Under this scheme or plan, one of the so-called certificate insurance policies is delivered in Wisconsin by the insurance company by mail to each purchaser of an automobile on the report of the sale by the Clark Motor Company to the Chrysler Sales Company and by that company to the insurance company, and the policy in each case names the purchaser and describes the car as the property insured in favor of the purchaser and other parties as their interests may appear.

We claim, and the court found, that under this plan the Palmetto Insurance Company, a foreign corporation, was doing an

insurance business in Wisconsin without having first paid the license fee and obtained a license therefor as required by sec. 201.41 of the Wisconsin Statutes, and without issuing and delivering such policies through and having them signed by a resident, authorized, or licensed agent holding a certificate of authority from the insurance commissioner as required by sec. 201.44 of the Wisconsin Statutes, and without complying with any of the regulatory provisions of the Wisconsin Statutes relating to the doing of insurance business in Wisconsin.

The application for this temporary injunction was heard before Justice Evans of the Court of Appeals and Judges Geiger, and Luse of the two district courts of Wisconsin after oral arguments and submission of briefs.

The court's opinion (T. R. 68) (9 Fed. (2d) 666) gives such a clear and comprehensive review of the law and authorities on the general subject of insurance, and of the special provisions in the Wisconsin Statutes regulating and requiring the licensing and controlling the manner of doing insurance business in Wisconsin for the protection of its citizens, that we feel like apologizing for attempting to add anything to that opinion and discussion, but we realize that sometimes the same fact or argument stated in a different way may be helpful in a proper solution of a controverted proposition, and upon that theory we submit the following for the consideration of the court:

ARGUMENT

Buying insurance is not like buying an article, object or thing which is open for examination and inspection by the purchaser, and where the value is in the thing itself. In insurance, its value depends very largely upon the responsibility of the company, the conditions of the contract, and the remedies available for its enforcement, of which the insured knows little or nothing. Because of such facts the business is subject to the police powers

of the state, and it may be licensed and regulated by the state in the interest of its citizens, the necessity for and the method and character of such regulations being largely in the discretion and judgment of the legislature of the state for the protection of its citizens.

Camfield v. United States, 167 U. S. 518;
Doyle v. Continental Insurance Co., 94 U.S. 535.

It is held that neither the original constitutional provision nor the Fourteenth Amendment specifies or limits the subjects upon which the police power of the state can be lawfully exercised, nor take away from the states the police powers that were originally exercised by them.

James v. Brim, 165 U.S. 180;
Mugler v. Kansas, 123 U.S. 623;
Barbier v. Connolly, 113 U.S. 27.

The United States Constitution was not designed to interfere with the police powers of the state to protect the lives, liberties and properties of its citizens.

Re: *Kremmler*, 138 U.S. 436.

The police power of the state covers all matters having a reasonable relation to the protection of the public health, safety and welfare.

State ex rel. Carnation Milk Products Co. v. Emery, 178 Wis. 147.

If the subject for the exercise of the police power is legitimate, the legislature may adopt such measures as are necessary to make it effective.

Id.

The power of the state to regulate business for the protection of its citizens gives to a state the power to license and regulate all insurance business and insurance companies, and as to an insurance company of another state or a foreign country, it is not a citizen within the protection of the United States Constitution, and it may therefore be absolutely prohibited from doing business in the state, or it may be allowed to do business on such terms and conditions as the legislature of the state may require, which, it is held, includes the right of the state to even prohibit such a company from transferring to the federal court a suit brought against it in the state court although that right could not be denied to a natural person who is a citizen of another state.

Doyle v. Continental Insurance Co., 94 U.S. 535.

The right of a state to absolutely prohibit a foreign corporation and especially a foreign insurance corporation from doing business in the state or to admit it on such terms as it sees fit, is discussed at length later in this brief. The above cases are cited here so as to have in mind the general rule while considering the provisions of the Wisconsin Statutes relating to and regulating insurance.

Provisions of the Wisconsin statutes

All personal property of insurance companies is exempt from taxation by sec. 70.11 which provides that:

> "The property in this section described is exempt from taxation, to wit: * * * (14) All the personal property of all insurance companies that now are or shall be organized or doing business in this state."

That refers alike to domestic and foreign companies. In lieu thereof sec. 76.30 provides that:

> "Every company transacting the business of insurance

against fire * * * shall pay to the state * * * each year, a tax of two and three eights per centum on the amount of the gross premiums received for direct insurance, less return premiums and cancellations on direct insurance, * * *."

Sec. 201.41 prohibits insurance companies from transacting any insurance business in the state without a license. It provides:

"No insurance corporation shall transact any insurance business in this state without first having paid the license fees and obtained the license therefor as required by law."

Sec. 201.38 provides that:

"No company incorporated under the laws of any other state or of any territory or of an foreign government, or other insurer having its home office outside of this state shall directly or indirectly take risks or transact any business of insurance in this state except upon compliance with and maintenance of the following requirements: * * *.

"(2) (a) Any such company or other insurer shall first file a written instrument, duly executed, declaring that it desires to transact the business of insurance in this state and that it will accept a license therefor according to the laws of this state, which shall cease and terminate in case such insurer shall remove or make application to remove into any court of the United States any action or proceeding commenced in any court of this state upon a claim or cause of action arising out of any business or transaction done therein, or in case it shall violate or fail to comply with any provision of law applicable to such insurer, or in case its capital shall be impaired to the extent of twenty per cent, and shall not be made good within such time as the commissioner of insurance shall require, if such commissioner shall, in either case declare its license revoked therefor.

"(b) Such insurer shall also appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any ac-

tion or proceeding against it may be served, and in such writing shall agree that any legal process against it which is served on said attorney shall be of the same legal force and validity as if served on the insurer, and that such authority shall continue in force so long as there is any liability outstanding against the insurer in this state, whether the license of such insurer to do business in this state shall remain in force or shall be revoked or otherwise terminated. A copy of such writing, duly certified, shall be filed in the office of the commissioner, and copies certified by him shall be deemed sufficient evidence thereof.

"(c) Service upon such attorney shall be deemed sufficient service for all purposes upon the principal, and shall be as effectual for all purposes as though made upon a corporation or other insurer existing under the laws of this state. The service of such process shall be made by leaving duplicate copies thereof in the hands or office of the commissioner of insurance and paying to him for the use of the state a fee of two dollars. A certificate by the commissioner of insurance showing such service and attached to the original or a third copy of such process presented to him for that purpose shall be sufficient evidence thereof. * * *.

"(3) It shall file in the office of said commissioner a copy of its charter, duly certified by its secretary, together with a statement verified by the oath of the president, vice-president or other chief officer and of the secretary, containing the name of the corporation, place where located, amount of its capital stock, and a detailed statement of its assets showing the amount of cash on hand and in bank, the amount of real estate, and how much of the same is incumbered by mortgage or otherwise, the number of shares of stock of every kind owned by it, the par and market value of the same, the amount loaned on bond and mortgage and other securities, stating the kind and amount loaned on each, the estimated value of the whole amount of such securities and all its other assets or property and the value thereof; also showing the amount of its indebtedness, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted as illegal or fraudulent and all other claims existing against it;

and a copy of the last report, if any, made under any law of the state by which it was incorporated."

Agents

Sec. 209.05 defines agents as follows:

"Every person * * * who solicits insurance * * * or transmits an application * * * or who makes any contract for insurance or collects any premiums * * * or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation."

Sec. 201.44 provides:

"(1) No policy of insurance shall be issued or delivered in this state by any company, except through an agent who shall be a resident of this state and hold a certificate of authority under section 209.04 for the kind of insurance effected by such policy.

"(2) In case of fire insurance, the agent shall countersign and enter the policy in a permanent record to be kept by him for that purpose. Such agent shall be paid the commission on the policy.

"(3) The books of every person transacting or purporting to transact the business of an insurance agent shall at all times be open to the inspection of the commissioner of insurance, his deputy or examiners and a refusal to permit such inspection shall be prima facie evidence of a violation of this section."

Sec. 209.04 (1) provides:

"No person, officer or broker, agent or subagent of any insurance corporation of any kind required to pay any tax or license fee to the state shall act or aid in an manner in transacting the business of or with such corporations in placing risks or in collecting any premiums or assessments or effecting insurance therein, without first procuring from the insurance

corporation a certificate of authority; nor shall any such person, officer, broker, agent, or subagent after such certificate shall have expired, or after revocation by the commissioner of insurance of such certificate or of the license of such corporation and until a new certificate or license shall have been issued to him, do or perform any such act for or in behalf of any insurance corporation. * * *."

Sec. 209.11 provides:

"No corporation, association, partnership or individual shall do any business of insurance of any kind, or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like in this state or with any resident of this state except according to the conditions and restrictions of these statutes. And the term insurance corporations as used in this chapter may be taken to embrace every corporation, association, partnership or individual engaging in any such business."

Sec. 203.07 provides:

"(1) All future contracts of insurance against the risk of loss or damage by fire or lightning upon property in this state shall be held to be made and effected within this state.

"(2) No unauthorized fire insurance company or other unauthorized insurer shall hereafter make or issue, directly or indirectly, any policy of insurance on property in this state, except as specifically authorized by law."

Sec. 201.40 provides that when the insurance commissioner is satisfied as to the responsibility of any company, he shall deliver a license and to every agent a certificate that the company is licensed.

Sec. 201.40 (2) then gives the insurance commissioner the same power and supervision over such foreign corporations as he has over corporations of the state.

Sec. 201.41 (1) provides:

"No insurance corporation shall transact any insurance business in this state without first having paid the license fees and obtained the license therefor as required by law."

The foregoing are the principal regulatory provisions of the Wisconsin Statutes enacted under the police power of the state to protect its citizens against irresponsible insurance companies and undesirable insurance contracts and schemes. They were not enacted all at the same time as one complete and perfect plan, but they have been enacted from time to time as experience has shown the necessity therefor and this is only one of many attempts on the part of shrewd, skillful, designing insurance men to evade the police regulations and provisions of the statutes of the state made for the protection of its citizens.

This case forcibly illustrates the necessity for the most stringent supervision and regulation of the insurance business. It may be safely assumed that each one of these insured citizens of Wisconsin believes that he has bought and holds an insurance policy contract of the kind and with all the rights, remedies and protection provided by the Wisconsin Statutes, while as a matter of fact, he has none of them. The policy is not of the form prescribed by sec. 203.04; the company has not been examined as to its financial responsibility; it has not been licensed; its agents have not been licensed; it has not appointed the insurance commissioner its attorney upon whom legal process can be served, so that if these policy-holders have a loss they cannot sue the company without going to Michigan, so they have none of the safeguards prescribed by the Wisconsin Statutes for their protection.

Under this Chrysler plan, the citizens of Wisconsin buy Chrysler automobiles from the Clark Motor Company in Wisconsin and also buy and pay for this automobile insurance as a part of the purchase price. That is a Wisconsin transaction with a Wis-

consin company, and they have a right to assume when they buy insurance in Wisconsin that they have all of the protection, rights and remedies for its enforcement that are given by the laws of the state. If they had gone to Michigan and bought the automobiles and insurance there, they would then be chargeable with knowledge of the fact that the insurance company might not be licensed to do business in Wisconsin, and if not, then it would not have been examined by the insurance commissioner of Wisconsin and that they would have to go to Michigan to sue on the policy contracts. But here the Wisconsin citizens are purchasing their automobiles in Wisconsin from a Wisconsin corporation and as a part of that purchase, buy and pay for this insurance in Wisconsin, and they have a right to the kind of insurance required by the laws of Wisconsin, and it is the duty of the defendant under the law as insurance commissioner to see that they get it.

The lower court has the right theory of this situation when it says (E. R. 80):

> "The fact that the contract in question postpones the existence of any insurance until after the transactions in Wisconsin above outlined differentiates (Fol. 102) the contract here from any in the cases called to our attention or which an independent search has revealed."

On page (T. R. 83) the court says:

> "The business done and to be done in Wisconsin under the plan in question in our opinion constitutes the transaction of business within the state and the Palmetto Company is one of those validly required to take out and pay for a license under sec. 201.41 (1) of the Wisconsin Statutes quoted above."

That is our theory of these Wisconsin laws which are intended for the protection of Wisconsin citizens when buying insurance in Wisconsin.

The purpose of and necessity for these regulatory provisions of

The supreme court of Wisconsin said in the case of *Cordy v. Hale*, 177 Wis. 68, at page 71, as to the provisions of the Wisconsin statutes:

> "* * * The license issued by the commissioner of insurance to a foreign corporation to transact business in this state is accepted by the citizen as an assurance from the state that it is solvent and financially sound, and that he is safe in transacting business with any such company whether it relate to insurance on property located within or without the state. * * *."

Clearly the courts should not enjoin him from furnishing that "assurance" and protection to the citizens of the state.

the statutes of Wisconsin is very clearly and forcibly stated by Justice Winslow in the case of *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 550, where he says:

> "The evil to be corrected is not the writing of a policy by an unlicensed company within this state alone, but the writing of such a policy at all. Bearing in mind the object of the statutes and the evil to be corrected, it is very plain that object will be largely defeated and the evil will flourish as before if it be held that companies without license can establish their agencies just outside of the state line and conduct their business by mail."

The court then says:

> "Counsel for respondent seeks to distinguish the foregoing case from the case at bar because the subject of insurance was property in Wisconsin, but no difference in principle is perceived. In each the contract attempted to be enforced is against the plain, positive prohibition of the statute. To hold otherwise would be to give foreign insurance companies a decided advantage over residents of this state and practically nullify the statutes passed by the legislature for their protection."

That decision was approved and followed in *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281.

This scheme is evidently intended to do the very thing that the court, in that opinion, says the insurance laws of Wisconsin were intended to prevent. That scheme for the protection of citizens of the state includes the appointment of a local agent and the delivery of the policy through him and with his signature thereon and he is required to keep books open to the inspection of the insurance commissioner and the insurance commissioner is required to examine the company as to its responsibility for the protection of the insured citizens of the state, which includes a provision for serving process upon the company in case of its failure to perform the contract. Here the insured has no remedy

in Wisconsin in case of loss. This insurance company in which he holds a certificate of insurance may be absolutely irresponsible so that his insurance protection which he bought as a part consideration for the purchase of his car may be no insurance at all when the loss occurs.

The only thing the insurance commissioner has been threatening to do, as alleged in the complaint, is to require the insurance company to bring itself within the provisions of the statutes so that he can furnish to the citizens of Wisconsin the protection against irresponsible insurance companies, and cheap or worthless insurance contracts that the statutes were intended to furnish him. This scheme was very clearly devised to prevent that supervision and protection and they are here asking this court as a court of equity to protect them in this conspiracy to evade the laws of Wisconsin which are intended to protect the interests of the insured citizens of the state against irresponsible insurance companies and to make it possible for an insured citizen of Wisconsin to enforce his insurance contract in case of loss. Clearly, a court of equity should not become a party to such a conspiracy.

It must be admitted that this Chrysler-Palmetto plan is a very shrewdly devised scheme to evade the regulatory provisions of state statutes and in Wisconsin it cannot be worked without knocking out the principal provisions of the statutes of the state made for the protection of its citizens and for that reason they did not get from the lower court, and should not get here, any technical or strained construction of constitutional or statutory provisions. Appellant has evidently experienced some difficulty in his efforts to perfect this scheme and make it an effective and practical plan for the conduct of its business in defiance of state regulations.

It has made two so-called master policies besides these certificate policies. On or about January 16, 1925 the Palmetto Fire Insurance Company and the Chrysler Sales Corporation entered

into a contract which is usually termed a contract *for insurance* and sometimes called in this case the "master policy." That contract is Exhibit "A" of the Bill of Complaint in this suit (T. R. 16).

On August 4, 1925 the Palmetto Fire Insurance Company and the Chrysler Sales Corporation entered into another contract of insurance or "master policy" which superseded or modified the contract of June 15, 1925 (T. R. 38-44) the superseding and modifying contract by agreement being made retroactive to the effective date of the original contract of June 15, 1925. This new and superseding contract was referred to by counsel for the Palmetto Fire Insurance Company as "Chrysler Palmetto Running Policy." Each of these master policies has in it the form of this certificate policy contract of insurance which is to be sent and delivered by mail by the insurance company to each purchaser of a Chrysler automobile in Wisconsin as his insurance policy contract. It describes itself as "This insurance" (T. R. 30) and is the insurance contract on which the Wisconsin citizens will have to sue in case of loss. Certain provisions in the so-called master policy became a part of it by reference made to it in the certificate.

This master policy provides in general:

(1) That the insurance effected should inure to the benefit of Chrysler Sales Corporation, and of such persons, firms, or corporations, as may have an equity in Chrysler cars because of moneys loaned thereon in connection with the financing of the sale on deferred payments, and of the purchasers of Chrysler cars at retail, the insurance to attach as their interests may appear.

(2) It insures against the hazards of fire and theft for a term of one (1) year all the interests arising upon the sale of each Chrysler car at retail during the term of the said Running Policy.

(3) It is in consideration of the premiums agreed to be paid

by Chrysler Sales Corporation to the Palmetto Fire Insurance Company of Detroit, Michigan.

(4) When the Clark Company in Wisconsin sells a car it is to report the sale to the Chrysler Sales Corporation, giving the name and address of the purchaser and that company reports it to the agent of the insurance company at Detroit and one of these certificate policies of insurance is then to be sent by mail to the purchaser of the car in Wisconsin and the copies are to be sent to the other parties interested in the car, *not on the order of the purchaser of the car but on the duty imposed by this plaintiff under the terms of the master policy.*

(5) In the event of loss, payments are to be made by the insurance company to the owner of the car and to others as their interests may appear.

It is claimed these contracts were made in an attempt to carry out a general plan devised by the Chrysler Sales Corporation for the promotion of sales of its cars in aid of its distributors and dealers, whereby among other articles, devices and equipment, there is included insurance on each car for the purchaser and others as their interests may appear.

We claim if the company is responsible, the business can be done under the Wisconsin laws, but this scheme was deliberately planned to evade the laws.

Under this Chrysler-Palmetto plan, Chrysler cars are shipped to distributors and dealers in Wisconsin and throughout the United States with bill of lading attached. Upon the payment of the draft attached to the bill of lading, the distributor or dealer actually becomes the owner of the car. The bill of lading of the car includes three items: (1) the wholesale price of the car; (2) the government tax on the car; and (3) delivery charge. *This delivery charge includes this fire and theft insurance premium* as explained by this plaintiff in a circular letter sent to its distributors and dealers throughout the United States sometime prior to July 1925 and which contains, among other things, the following:

INSURANCE

"Effective July 1st, 1925, *all Chrysler cars sold will include fire and theft insurance* coverage for 100 per cent. of the f. o. b. factory list price, prepaid for one year. Our billing on and after that date against Distributors and Dealers on all Chrysler vehicles shipped by us *will include a charge classified on our billing as* 'Delivery Charge' and graded as follows:

Chrysler four cylinder open cars	$10.75 net per car
Chrysler four cylinder closed cars	12.75 net per car
Chrysler six cylinder open cars	16.50 net per car
Chrysler six cylinder closed car	18.50 net per car
Commercial car chassis	10.75 net per car
Commercial car chassis with body	12.75 net per car

"These Delivery charges *will be collected by us* from Distributors and Dealers on all cars purchased from us *and represent that portion of cost to be collected by the Distributor or Dealer from the retail purchaser* when making delivery of the new car.

"Distributors will collect Delivery Charges from Dealers when making wholesale deliveries from their stocks to Dealers.

"As this plan will become effective July 1st, 1925, on all cars sold and delivered to purchasers on and after that date, it is very important that Distributors and Dealers send us on July 1st, 1925, a complete inventory, by models and serial numbers, of all Chrysler six and four cylinder cars carried by them in stock, unsold. This inventory should be accompanied by the Distributor's or Dealer's check *to cover the 'Delivery Charge'* as described above on each Chrysler car carried in stock and included in the inventory.

'The actual 'Delivery Charge' made by us against Distributors and Dealers *will be recovered by them from the retail purchaser when making delivery of the new car purchased and must be included by the Distributor or Dealer in the delivered price, to the purchaser.*

"Effective July 1st, 1925, therefore, Distributors and Dealers delivered prices of all Chrysler cars is to be increased by the amount of the delivery charge made by us.

EXAMPLE

"Present delivered price on Chrysler Sedan—List $1,825.00—Tax $66.16—Freight and handling, say $58.84—Net local cash delivered price, $1,950.00.

"On and after July 1st, 1925, add $18.50 to present price making local delivered price $1,968.50," which includes the insurance cost.

The dealer in every instance pays the Chrysler Sales Corporation for all cars shipped to him by taking up the bill of lading as soon as it arrives so that the Chrysler Sales Corporation is paid for the car shortly after the shipment, irrespective of when it may be sold at retail by the dealer.

Obviously, when the Chrysler Sales Corporation thus receives its money for a car and parts with all title or interest therein, it thereupon instantly loses any and all insurable interest in that car.

The so-called "master policy" or agreement between the Chrysler Sales Corporation and the Palmetto Fire Insurance Company contained, among others, the following provision:

1. The Palmetto agreed to insure each car sold by the Chrysler Sales Corporation up to its list price against fire and theft, which insurance was to become effective for a period of one year from date the car was sold at retail by the dealer.

2. On the 15th of each month the Chrysler Sales Corporation agreed to give a statement to the Palmetto of all cars sold at retail during the last preceding 30 days, and to pay thereon under the master policy the agreed premium on these cars.

3. The Palmetto agreed that the insurance on each car should be effective the instant there was a sale of the same at retail, irrespective of the collection by it of any premium for such insurance, relying solely upon the responsibility of the Chrysler Sales Corporation for such premium.

It is to be noted that all cars sold by the Chrysler Sales Cor-

poration are attempted to be covered b insurance under the so-called "master policy" for one year from and after the date of sale by the dealer to the purchaser. The insurance seems to be designed for the benefit of the parties in interest so far as their interests might appear. On the day of the sale to the purchaser and when he takes title all interest theretofore had therein successively by the Chrysler Sales Corporation, the distributor or the dealer as such, is extinguished, and with the extinguishment of such interest goes any insurable interest theretofore had therein —all of which events happen before the contemplated insurance becomes effective or is brought into existence.

In carrying out this plan of insurance, it is provided in the contract or "master policy" that certificates of insurance shall be issued and delivered to the purchasers of Chrysler cars and like duplicate certificates to the finance company or any other person having an interest in these cars. These certificates are to be issued by the Palmetto Fire Insurance Company and delivered to the respective purchasers by mail. Although it is stated in the "master policy" that the issuance and delivery of these certificates are not necessary to make the insurance effective, nevertheless it is provided in the "master policy" that:

> "Insurer (the insurance company) *shall issue* certificates to purchasers substantially in the form attached hereto which certificates, and insurance evidenced thereby, *shall not be subject to cancellation by either party.*"

The certificate appears to be a part of the contract or "master policy." The certificate is the only paper or contract or policy that is intended to be delivered to or reach or be placed in the possession of the insured purchaser. It does not contain all of the terms and conditions of the contract as required by the Wisconsin statutes. It certifies, among other things, that the insurance is issued:

"subject to all the conditions, stipulations, provisions, exclusions and warranties *set forth in said policy* (the master policy) *or which appear* hereon."

So by that reference it makes the provisions of the master policy a part of it. But as to the insured purchaser of the automobile and those interested in the automobile under him, it is the insurance contract, or policy of insurance, delivered in the state of Wisconsin within the meaning of section 201.44 and other provisions of the Wisconsin Statutes and is the insurance policy contract delivered in Wisconsin as found by the lower court and is the contract that the insured resident of Wisconsin would have to sue on in case of loss. Any right that he might have because of provisions in the master policy would be based upon his certificate policy contract.

Neither of those contracts of insurance comply with the standard form of insurance policy contracts required by secs. 203.04 and 203.06 of the Wisconsin statutes.

We understand the plaintiff to contend that under this plan no act is required on the part of a dealer to bring the insurance into effect; that the sale of the car by the dealer brings it into effect —an obvious contradiction. We submit that the Palmetto Fire Insurance Company has, by this contract or "master policy," constituted the dealer in Wisconsin, its agent, to sell this insurance with the sale of each car and to bind its assets to the extent of the insurance on a given car by the very act of making a sale of the car to a purchaser in Wisconsin, and has accepted this act of the dealer as creating a liability on its assets to the extent of the coverage, i. e., the full factory value of the car and for a period of one year from the day the dealer sells the car to the purchaser.

This insurance coverage is for the benefit of the retail purchaser and the holder of the deferred payment indebtedness. It applies to actual retail sales only. Distributors and dealers are required to send a daily record of retail sales deliveries, compiled

on forms supplied by the Chrysler Sales Corporation, to the insurance agents Alexander & Alexander, care of Chrysler Sales Corporation at Detroit, Michigan. The insurance agents then mail the purchaser direct this formal insurance certificate policy contract. Here is a direct connection between the dealer in Wisconsin making the sale of automobiles and insurance and the general agents of the Palmetto Fire Insurance Company.

The purpose of this entire scheme of insurance, as set forth in Exhibit "A" to the Bill of Complaint herein, is as follows:

"II. PURPOSE

"Chrysler desires to increase the retail sale of Chrysler cars and to obtain for dealers a uniform maximum rate for financing retail sales *and to provide insurance* at a uniform maximum rate throughout the entire United States for the benefit of purchaser or other parties mentioned in the policy and certificates as their respective interests may appear on each Chrysler car purchased at retail. Chrysler proposes to advertise throughout the United States the benefits resulting to purchasers from insurance under policy and certificates issued hereunder. Commercial Credit desires to obtain so far as possible the financing of the retail sales of Chrysler cars. Insurer (Palmetto Fire Insurance Company) desires to obtain insurance in respect to all Chrysler cars sold and leased and delivered at retail to purchasers by dealers throughout the United States during the term of this policy." (Italics ours.)

This tri-party competitive device was, therefore, conceived for the purpose of benefiting *Chrysler, the credit company, and the insurance company*, with the purchaser of the car only as a necessary convenience, the principal object being, we think, to save license fee and state regulation.

This contract or "master policy" is not executed directly between the fire insurance company and the purchaser of a Chrysler car. It is issued directly to the Chrysler Sales Corporation, and

the individual purchasers of the cars throughout the United States are not parties to that contract. The purchaser of a Chrysler car may be entirely ignorant of the existence of the "master policy" until he receives his insurance certificate, or certainly until he has been solicited by a local automobile salesman who represents to him that in the event he purchases a car a fire and theft policy will be issued to him.

In order that the purchaser of a car may have the benefit of this insurance, it is necessary that there shall appear an intermediary in the person of an automobile salesman. This salesman must at some time during the sale of the car represent to the purchaser that the sale of the car includes insurance. He naturally advances this as one of the reasons for the purchase of a Chrysler car. He holds that out as an inducement not possessed by other automobile manufacturers. This must have been the main reason the Chrysler Sales Corporation had in view when it launched the scheme. When a Chrysler dealer sells a car in Wisconsin, several things have to be done in Wisconsin, in order to bring this insurance into force. No citizen of Wisconsin can obtain one of these insurance certificates on property that he owns on his own initiative. The first movement will come from a Chrysler dealer who approaches a citizen of Wisconsin for the purpose of selling him a car. This is the first actual moving part of a contemplated contract. The dealer will have to persuade a citizen of Wisconsin to buy a car. The purchaser will himself have to take a part in this movement. He will have to agree to accept the proposition of the dealer and, in addition, will have to agree to pay the price asked. The offer to sell on the part of the dealer and the agreement to buy on the part of the purchaser, together with his agreement to pay a stipulated price, constitutes a full, definite and completed contract, every step in which must transpire and be effective in the state of Wisconsin. Somewhere wrapped up in this contract of sale and purchase is

the insurance certificate which passes as a part of the property sold to the purchaser and for which the purchaser agrees to and actually does pay as a part of the consideration for the entire purchase. This is true even though the premium for this insurance may have been paid in the first instance by the Chrysler Sales Corporation. While Chrysler voluntarily pays this premium to the insurance company, after he has received it from the distributor or dealer, nevertheless the insurance premium is included in and is a part of the final and ultimate purchase price paid by the purchaser. The transaction is not yet complete. The automobile salesman is then required to report the sale and the name and address of the purchaser to the Chrysler Sales Corporation and then to the insurance agents in the state of Michigan. This reporting movement is also a necessary part of the completed contract and is wholly performed in the state of Wisconsin, and is absolutely required in order to bring the certificate of insurance into existence. The dealer, therefore, sells cars and insurance at one stroke. Without him, the insurance would not and could not be effected under this plan of doing business.

From the revealed facts in this case we submit:

First, that the Palmetto Fire Insurance Company and the Chrysler Sales Corporation have entered into an agreement to insure automobiles located in the state of Wisconsin and to issue and deliver insurance to the residents of the state of Wisconsin upon automobiles in this state, with the intent of evading the laws of the state of Wisconsin enacted for the purpose of supervising, regulating and taxing the business of insurance as affecting the risks located in the state.

Second, that the Palmetto Fire Insurance Company is issuing insurance upon risks located in the state of Wisconsin and to residents of this state with intent to escape from the provisions, restrictions and safeguards imposed by the Wisconsin insurance laws upon companies authorized to do business in this state.

Third, that the Palmetto Fire Insurance Company is defrauding the state of Wisconsin out of the taxes which are rightfully due it under the laws of this state.

Fourth, that the Palmetto Fire Insurance Company, and the Chrysler Sales Corporation, have entered into this agreement to promote the sale of automobiles by a plan subversive of sound insurance as developed by years of experience, and this practice is destructive of the policy of the state of Wisconsin as expressed by laws heretofore enacted for the protection of its citizens.

Insurance not commerce

On the question of an insurance contract, being purely personal in its nature, and on the question of such a contract having no element of commerce, interstate or otherwise, the authorities are collected and digested in the case of *New York Life Insurance Company v. Deer Lodge County*, 231 U.S. 495. The opinion in that case was delivered by Mr. Justice McKenna who, after reciting the facts, reviews the authorities starting with the case of *Paul v. Virginia*, 8 Wall. 168. Justice McKenna, beginning on page 502 and continuing through to page 511, quotes from and reviews a number of cases establishing these two elements as the settled law of this country. The cases considered in this opinion, in addition to *Paul v. Virginia*, are:

Ducat v. Chicago, 10 Wall. 410;

Liverpool Insurance Company v. Massachusetts, 10 Wall. 566;

Philadelphia Fire Association v. New York, 119 U.S. 110;

Hooper v. California, 155 U.S. 648;

Noble v. Mitchell, 164 U.S. 367;

New York Life Insurance Company v. Cravens, 178 U. S. 389;

Nutting v. Massachusetts, 183 U.S. 553;

Equitable Life Society v. Clements, 140 U.S. 226;
Nathan v. Louisiana, 8 How. 73.

In answer to the attempts made in that *Deer Lodge* case to get the court to change the rule of the case of *Paul v. Virginia* or to limit its scope so as not to apply to that case, the court said at page 510:

"The basis of this contention necessarily is the insistence that the contracts in *Paul v. Virginia* and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that *contracts of insurance are not commerce at all*, neither state nor interstate." (Italics ours.)

As to the conclusiveness of that rule as the established law of the land at that time, the syllabus says:

"The sanction of the rule of *stare decisis* urges this court against reversing a long series of decisions where state legislation has been enacted in reliance thereon, and the reversal would involve the promulgation of a new rule of constitutional inhibition on state legislation necessitating readjustment of policy and laws."

In *Paul v. Virginia supra*, Justice Field in discussing the insurance contract and interstate commerce used these memorable words:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put

up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

What constitutes doing business

On the question of what constitutes doing business in a state by a corporation not therein licensed, and particularly of an insurance company of another state not licensed in the state of New York, the case of *Lumbermen's Insurance Company v. Meyer*, 197 U.S. 407, is important. The court, on page 414, said:

"* * * If it be conceded that the contract was made in Philadelphia it does not follow that all its business was therefore done in the state of Pennsylvania. The contract was an insurance policy issued upon real estate and machinery in a building situated in * * * New York. The contract was to pay the amount of loss which might be sustained by fire as specified in the policy. The policy provides for the manner of determining the amount of this loss, either by agreement between the company and the owner, or, in case of disagreement, then by the appraisers as already stated. The provisions of the contract clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred, for the purpose of determining its extent and adjusting, if possible, the amount payable by the company to the owner. If no such adjustment can be made the policy provides in terms for the appointment of appraisers, one by the company and one by the owner, and if they disagree, an umpire shall be appointed, and the agreement of any two shall be binding. After that the loss is payable to the owner by the company within sixty

days. As the policy insures against loss, it of course contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract the company sends its agent into the state where the property was insured and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state. A fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. *If not doing business, in such case, what is it doing?* It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the state of New York. Many contracts of the nature of the one in suit were entered into by the company covering property within the state. We think it would be somewhat difficult for the defendant to describe what it was doing in New York if it was not doing business therein, when sending its agents into that state to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out.

"We have no difficulty in concluding that the defendant was doing business in the state of New York during all the time of the existence of these policies."

The above opinion was delivered by Mr. Justice Peckham. Under the recited facts, Justice Peckham asks the pertinent query: If the insurance company was not doing business in New

York, what was it doing? The reasoning of Justice Peckham there adopted appealed forcibly to the courts in later cases because it has been entirely followed or the language of his opinion liberally quoted in the following cases:

Laurentide Company v. Durey, 231 Fed. 228;
Iowa State Traveling Men's Association v. Ruge, 242 Fed. 766;
Beach v. Kerr Turbine Company, 243 Fed. 710;
Phillips Co. v. Everett, 262 Fed. 344.

In *Laurentide Co., Ltd., v. Durey, supra*, the complainant, a Canadian corporation, was assessed by the Collector of Internal Revenue on "business done" in the United States. It protested and brought suit to recover the taxes. The question was whether or not the corporation was "doing business." The learned District Judge (Ray), delivering the opinion, said:

"These business transactions were commenced within the United States by soliciting contracts; the making of the contracts by signing was consummated in Canada in part, but the delivery thereof was made in the United States. The corporation sent its goods into the United States and stored them in its own name, retaining and having complete title. It delivered from its own rented warehouses in the United States, and, when payment was made to it by check, it collected such checks in the United States and deposited the proceeds to its own credit in its own bank account in the United States and, as stated, paid all its liabilities incurred in the business done in the United States by checks drawn on such bank account, and therefore made payments completing the various transactions in the United States. True, some of the business connected with these transactions was done in Canada; for instance, the approval of the contracts and the shipping of paper into the United States, and the receipt and indorsement of checks received prior to actual deposit for collection. All the conditions of these contracts were not to be complied with in Canada. The most of them and the more important ones were to be

performed in the United States. Here delivery was to be made, and here the contract was solicited, agreed upon, and signed by the purchaser. Here the Laurentide Company had its property with which to make deliveries in storage at its own expense in its own warehouses—those hired and paid for by it.

"Appropriating the idea of Mr. Justice Peckham expressed in *Pennsylvania Lumbermen's Mutual* * * * (*supra*) I think it would be somewhat difficult for the Laurentide Company, Limited, or its able attorney, to describe what it was doing in the United States, if it was not doing, carrying on, and transacting business therein * * *."

In the case at bar the Chrysler dealer has the car in Wisconsin; he has the title in his own name; it is stored in his own warehouse or place of business; he solicits a purchaser and when the purchaser buys the car, the insurance attaches, whether the purchaser wants the insurance or not. If the dealer failed to tell the purchaser about the insurance, the insurance would attach anyway, but can any one imagine a dealer failing to point out such an important thing in negotiating for the sale of a car, even if it sold for cash or was given away by the dealer.

In *Commercial Mutual Accident Co. v. Davis*, 213 U.S. 245, the Supreme Court said at page 255:

"It is further contended that the defendant company was not doing business within the state of Missouri. That it is essential in order to obtain jurisdiction over a foreign corporation having, as in the case at bar, neither property nor agent in the State, that it be doing business in the State is settled by numerous decisions of this Court.. *St. Clair v. Cox*, 106 U.S. 350; *Goldey v. Morning News*, 156 U.S. 518; *Barrow Steamship Company v. Kane*, 170 U.S. 100; *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U.S. 602; *Conley v. Mathieson Alkali Works*, 190 U.S. 406; *Lumbermen's Insurance Company v. Meyer*, 197 U.S. 407; *Peterson v. Chicago, Rock Island & Pacific Railway Company*, 205 U.S. 364.

"Was the defendant doing business in the State of Missouri? The record discloses, and the Court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and *it was the right of the company to investigate losses thereunder, to have an examination of the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment* of any loss."

In *Phillips v. Everett, supra*, the Federal Court of Michigan held:

"For the purpose of this case, it is perhaps immaterial where this contract was executed. In the case of *Empire Fuel Co. v. John E. Lyons*, 257 Fed., 890 (C. C. A.), Judge Knappen, in discussing this question, said:

" 'It does not follow from the fact that the contract was made in West Virginia that all business done under it must be regarded as done in that state. * * * *Lumbermen's Ins. Co. v. Meyer*, 197 U. S., 407, 414.' "

In *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, it was held that an insurance corporation which had been doing business in a foreign State (Tennessee) but after withdrawal, sent an adjuster into the State to adjust a loss under policies written while it was licensed to do business, was still doing business in the State of Tennessee.

In *Pennsylvania v. Equitable Life Society*, 239 Pa. 288, (affirmed by the Supreme Court, 238 U. S. 143) the Supreme Court of Pennsylvania said at page 291:

"In order to determine the question in controversy we must ascertain the source of the premiums which were paid to agencies outside the State. If they were received by the society *from business done within the Commonwealth*, then they were subject to the tax. If they did not come from such business they were not subject to the tax. What, then, is the meaning of the words 'business done within this Commonwealth' as

used in the statute taxing gross premiums of every character and description, received from such business? Manifestly the business in which the society is engaged is that of insuring lives; that is, in furnishing protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated in the policy. Furnishing this protection is the business to be done by the society within this Commonwealth, as contemplated by the statute, which fixes the amount of the tax which it, as an insurance company organized under the laws of another State, is to pay for the privilege of entry and doing this business within this Commonwealth, and with our people, its residents. * * * The defendant society does not exist merely for the collection of premiums; that is a mere incident to the great and beneficent purpose for which it exists. When it comes within our borders to do business, it renders a service; it furnishes protection and indemnity to its beneficiaries, residents of the State of Pennsylvania. That is the business which it does in Pennsylvania, and that is the purpose for which it seeks and is granted permission to enter. Furnishing that service, that insurance against loss, it makes a proper charge to cover the cost of the service which it renders, and that charge is the premium. It is simply payment for the valuable service it renders. Whether that service be paid for on the spot where the service is rendered, or whether the amount be remitted to the home office, does not change the character of the business done, and for which recompense or payment is made. If it happens to be made to an agency in Pennsylvania the defendant society admits without question that it is received from business done within this Commonwealth, and is subject to the tax. How can the fact, or the character, of the business done for the benefit of residents of Pennsylvania, be altered or affected in any way, by the manner in which, or the place where, the payment for the business done and the service rendered, is made? Clearly it cannot be so affected."

On the appeal of the above case to the Supreme Court of the United States, *Equitable Life Society v. Pennsylvania*, 238 U.S.,

143, the Supreme Court held that the State of Pennsylvania was not entitled to tax the premiums unless the Company was "doing business" within the State of Pennsylvania. On that phase of the case the Court said at page 146:

"*The question is not what is doing business within a State in such a sense as to lay a foundation for service of process there.* It being established that the relation of the foreign company to domestic policyholders constituted doing business within the meaning of the statute, the question is whether the Company may be taxed in respect of it, in this way, whatever it may be called. We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policyholder would of itself give jurisdiction over the Company. The argument of the State Court is that the Company is protecting its insured in Pennsylvania equally whether they pay their premiums to the company's agent in Philadelphia or by mail or in person to another in New York.

"These are policies of life insurance and according to the statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its rights to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally by protecting the lives insured, wherever the premiums are paid. *The tax is a tax upon a privilege actually used.* The only question concerns the mode of measuring the tax. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162, 163. As to that a certain latitude must be allowed. *It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death.* See *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602,

611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 415."

In the above case of *Equitable Life Society v. Pennsylvania, supra*, and in the case of *Commercial Mutual Accident Co. v. Davis, supra*, the important question was what constitutes doing business in a state. It is there held in substance that where an insurance company has the right to investigate losses under a given contract; to have an examination of the body of the deceased (as in the *Davis* case, which in the case at bar would be the right to examine an automobile where a loss was claimed); to do whatever might be necessary to an adjustment or payment of any loss; to attend to many of the incidents of the contract in the state; to send an adjuster into the state in case of dispute to make proof of death under a life insurance policy (or proof of loss of an automobile in the case at bar)—all these things are the best kind of evidence that the insurance company is in truth and in fact "doing business" in the state where the losses occur and where adjustments will have to be made.

The Palmetto Fire Insurance Company under its certificates issued to the purchasers of Chrysler cars in Wisconsin has the right to do all of the above things incident to its business; to adjust its losses in Wisconsin, and must in fact adjust them according to the laws of Wisconsin through agents, appraisers and adjusters acting for the Insurance Company in the State of Wisconsin. Therefore, such rights would bring the case at bar within that line of authorities which holds these and similar acts to be "doing business" in the state.

In the late case of *Fidelity & Deposit Co. v. Tafoya, et al.*, 70 L. ed. 379 (advance sheet), the Court cited at the end of the majority opinion the case of *Palmetto Fire Insurance Co. v. Beha*, C. C. A., Second Circuit, November 10, 1925, in support of the *Fidelity & Deposit* case. It is to be remembered however, that in the *Fidelity & Deposit* case the plaintiff conceded that New

Mexico could regulate everything done within the State but that a foreign insurance company admitted to do business in New Mexico had the right to pay its employes for services rendered outside of New Mexico in soliciting policies that affected property in New Mexico. The plaintiff further conceded that, if the acts for which the corporation commission threatened to cancel the license of the plaintiff had been done within the borders of New Mexico, the license could be cancelled.

So it appears that the *Fidelity & Deposit* case actually turned on the question of payment of services outside the State, and since such transactions were had without the State they could not be regulated by the State. So it was held that the New Mexico statute was unconstitutional.

In citing the opinion of *Palmetto v. Beha, supra*, this court must have relied upon the finding of fact in the opinion that the Palmetto was *not doing business within the State of New York* and that the lower court had correctly applied to such a finding of fact the principle that New York could not regulate business done outside the State of New York. That is further shown by the fact that the *Palmetto v. Beha* case was there cited with *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346, which holds that the State cannot regulate extraterritorial business or tax the same.

In this case the District Court found that the Palmetto Insurance Company was doing business in the State of Wisconsin. Under such facts we submit that neither the *Palmetto v. Beha* case nor the *St. Louis Compress* case could have been cited in the *Fidelity & Deposit* case.

It is held that the place where the last act is done necessary to complete the transaction is the place of the contract.

> *McElroy v. Metropolitan Life Insurance Company*, 122 N.W. 27, 84 Neb. 866.

In this case the delivery had to be made in Wisconsin by mail,

the postal department being the agent of the insurance company for making the delivery, for that was the method of delivery adopted by the insurance company and this plaintiff.

In *Crutcher v. Kentucky*, 141 U.S. 47, it was sought to regulate the agents of foreign express companies, but the court held because the company was engaged in that business in interstate commerce the state could not regulate. On page 59 of the opinion, the court said:

> "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. *The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that State.*" (Italics ours.)

A fire insurance company of another state doing business in Kentucky is not entitled to an injunction to restrain enforcement of a state rate law on the ground that it is unconstitutional as depriving plaintiff of property without due process.

Citizens Insurance Co. v. Clay, 197 Fed. 435.

In the case of *German Alliance Insurance Company v. Kansas*, 233 U.S. 389, 412, this court discusses at length the character and nature of insurance contracts and business and the right to regulate it. It says, page 412:

> "Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every State in the Union superintendence and control over the business of insurance are exercised, varying in details and extent."

The court then enumerates a number of ways in which the insurance business has been regulated and then at pages 412 and 413 says:

"Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. * * * We can see, therefore, how it has come to be considered a matter of public concern to regulate it, * * *."

Because of such facts it was held that the liberty of contract guaranteed by the fourteenth amendment is not applicable to such business.

"The insurance business for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislature of that state."

Constitution of U.S. Revised and Ann. by Payne, 509, 510.

citing

Crutcher v. Railway Co., 141 U.S. 59;
Allgeyer v. Louisiana, 165 U.S. 578;
Doyle v. Continental Insurance Co., 94 U.S. 535;
Ducat v. Chicago, 10 Wall. 410;
Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566;
American Fire Insurance Co. v. King Lumber & Mfg. Co., 250 U. S. 2;
Calker v. Birmingham & N.W. Ry. Co., 249 U.S. 522.

Insurance is not commerce between states within the meaning of the constitution so a state may exclude foreign insurance companies from doing insurance business in such state or it may license and regulate it as it sees fit.

8 Fletcher Cyclopedia of Corporations sec. 5776, et seq. p. 9624 et seq.;
1 Joyce Insurance 328 et seq.;
14 R. C. L. 1386;
22 Cyc. 1386;
12 C. J. 1143.

Wisconsin and Michigan cases

In the case of *Indiana Road Machine Company v. Town of Lake*, 149 Wis. 541, 136 N.W. 178, it is held that the penalty for "doing business" in Wisconsin imposed on foreign corporations failing to comply with section 1770*b*, Stats. 1898, is that

> "every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within the state * * * shall be held void on its behalf and on behalf of its assigns but shall be enforceable against it or them."

An Indiana corporation shipped a machine to one Paul Welbes, chairman of the Town of Lake, in Wisconsin, on the understanding that it was to be purchased by the town. Immediately upon the arrival of the machine in Milwaukee it was delivered to Welbes, who put it to use there for himself. On the evening of the day it arrived the members of the Town Board of the town of Lake made a contract to purchase the machine. The Supreme Court of Wisconsin held that when the contract was entered into the machine was no longer in the possession of the carrier, had ceased to be an object of interstate commerce and had become property within the State. Therefore, the company could not recover on its contract which was void under the statute cited.

In the case of *Loomis v. People's Const. Co.*, 211 Fed. 453, it was held that contracts of a foreign corporation in Wisconsin are void if they affect its personal liability or relate to property within the state and are made before the corporation has complied with the requirements prescribed for "doing business" in the state (Wisconsin statutes, sec. 1770*b*). Such contracts will not be enforced by the Federal Courts. In this case the Reinforced Concrete Pipe Company entered into a contract at Janesville, Wis., with the People's Construction Company for the manufacture of concrete pipe, agreeing to furnish all the forms and

steel reinforcement required for the construction as well as the superintendent, but not the concrete or the labor. The pipe was to be manufactured in Janesville "along the line of sewer construction of said city." The Pipe Company's forms, derrick, saddle and reinforcing material were, for the purpose of this work, shipped to Janesville from outside the state. The Pipe Company had no office or general place of business in Wisconsin. The transaction was held not to be one of interstate commerce. Although it was an isolated transaction the law related to it, the Wisconsin rule being that "a single contract falls within the ban of the statute." The contract was made in Wisconsin and it affected the personal liability of the Pipe Company, hence neither it nor its assignee were entitled to recover.

The reasoning in the above two Wisconsin cases, as applying to the so-called Chrysler-Palmetto insurance policy or contract, is that if the contract or policy of insurance is one "affecting the personal liability" of the foreign non-complying corporation (the Palmetto Insurance Company) then the transaction is "doing business."

In the case of *Sprout, Waldron & Co. v. Amery Mercantile Co.*, 162 Wis. 279, the facts were that a Pennsylvania company not licensed to do business as a foreign corporation, sold an attrition mill to a customer in Wisconsin, under a contract reserving title until the purchase price should be paid. The machinery proved unsatisfactory. A new mill was sent to replace it. Subsequently the corporation entered into a contract with another Wisconsin company for two mills including the one that had been rejected and set aside by the first customer. Complaint in an action against the second company to collect the purchase price of the two machines was dismissed, because the non-authorization of the corporation to do business in the state rendered the contract void. The resale of the old mill was not interstate commerce, but related to "property within the state."

In the case of *Phoenix Nursery Co. v. Trostel,* 166 Wis. 215, the Phoenix Nursery Company, an Illinois corporation, without procuring a license to transact business in Wisconsin, entered into a contract with the defendant whereby it agreed to sell him certain trees and shrubs and to plant them on his premises in Milwaukee according to plans and direction of his landscape architect. The trees as shipped were unsatisfactory and the purchaser refused to pay for them and set up as his defense to the action the failure of plaintiff to comply with the requirements of the statutes as to procuring authority to transact business in the state. The Supreme Court of Wisconsin sustained the defendant's contention and held the contract void.

In the case of *Wisconsin Trust Company v. Munday,* 168 Wis. 31, deeds for real estate located in Wisconsin, worth between $60,000 and $75,000 were given to the Realty Realization Company, a Maine Corporation, on February 28, 1913, at which time the company had not complied with the provisions of section 1770*b*, Stats. Through various conveyances, the property attempted to be conveyed was used as security for a loan of $40,000 made by the La Salle Street Trust & Savings Bank. It was claimed that the failure of the Realty Realization Company to comply with this statute did not render the deeds absolutely void for three reasons: (1) The business was not transacted in Wisconsin; (2) the transaction was interstate in character; and (3) the statute applies only to bilateral and executory agreements, and does not apply to executed contracts. The court, however, holds otherwise. It says in part:

> "Certainly the deeds in question are within the terms of this statute, for they clearly relate to property within this state. In the consideration of this case we regard as immaterial the fact that the contract was negiotiated in the state of Illinois. No matter where negotiated, it was a transaction relating to property within this state, and under familiar principles its validity must be determined in accordance with the laws of

this state. But it is claimed that because the business was transacted in the state of Illinois it is interstate in character because as a part of the transaction the Wisconsin owner of the real estate in question received 50 shares of the common stock o fthe Maine corporation, and by the terms of the contract was to receive 700 shares of the preferred stock of the corporation. * * * We see no circumstances connected with this transaction from which it may be inferred that it was interstate in character. * * * Nearly every deed or conveyance is given pursuant to an antecedent contract written or oral and if the statute should be held not to apply to a deed given in performance of such antecedent contract, its purpose would be defeated. While the statute is in many respects a harsh one, it has nevertheless been upheld repeatedly by this court, and thereafter reconsidered by the Legislature in some of its aspects, and no change has been made to avoid or modify the interpretation placed upon it by the court. * * * Upon the authority of the prior decisions of this court we must hold that the deeds given by the Wisconsin Trust Company and Frederick Robinson to the Realty Realization Company are absolutely and wholly void as to the Realty Realization Company and its grantees."

On the appeal of the above case to this court and in *Munday v. Wisconsin Trust Co., et al.*, 252 U. S. 499, it was argued that the above holding conflicted with the due process clause of the Federal Constitution; but this court there said:

> "Where interstate commerce is not directly affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. * * * No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared: 'The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' "

In the case of *State ex rel. Goldwyn Distributing Corporation v. Gehrz*, 181 Wis. 238, 194 N.W. 418, the court held that un-

licensed foreign corporations cannot resort to state courts. In an action by an unlicensed foreign corporation against a licensed foreign corporation for breach of a contract, made in New York, concerning the leasing of real estate there, and the breach occurring, if at all, in New York, the Supreme Court of Wisconsin held that since there was no question of interstate commerce involved, the non-resident, non-complying foreign corporation could assert no constitutional right to resort to the courts of Wisconsin for original redress. Under sections 1770*b*-1770*d*, Stats. the corporation for default in obtaining a license is absolutely prohibited from transacting any business in the state and there is plainly indicated a public policy which authorizes and justifies a denial of the use of the courts to settle the controversy presented.

In the case of *Republic Acceptance Corp. v. Bennett*, 189 N. W. 901 (a Michigan case), the plaintiff, a foreign corporation, was engaged in the business of purchasing or discounting securities obtained on the sale of motor vehicles. It maintained a branch office at Detroit and employed a manager to take charge thereof. Through him and others sent to assist him, it solicited and obtained a large amount of business, furnished the blanks on which securities and assignments were written, secured investigation of the financial standing of customers and made payments of the consideration. The Michigan court held that this was "doing business" in the state and no recovery could be had on the contracts because of the failure of the corporation to qualify under the Michigan statutes. The fact that the contracts were subject to the approval of the home office, outside the state, did not impress on these contracts the characteristics of a transaction in interstate commerce.

> "All the negotiations leading up to the purchase of the securities were conducted in Detroit. The assignments and guaranties were executed there and delivered to the plaintiff's

manager. He sent them to Pittsburgh for approval, and after such approval, the transaction, which had hitherto been but a proposal on the part of the defendants, became a binding contract by the delivery of plaintiff's check to the defendants at Detroit in payment of the consideration therefor. The contract clearly was made in this state and subject to the applicable provisions of the statute."

Insurance contracts—police power

Contracts of insurance fall within the police powers of the state and may be regulated in the interests and for the protection of the public.

32 C. J. 983 and cases;
12 C. J. sec. 432, Note 96;
22 Cyc. 1386 and cases.

The police power comprehends all those general laws of internal regulation necessary to secure peace, good order, health, and the comfort of society, private interests being subservient to the general interests of the community.

Constitution of the United States Revised and Annotated by Payne, 310, citing

Slaughterhouse Cases, 16 Wall. 62;
Munn v. Illinois, 94 U. S. 125;
Patterson v. Kentucky, 97 U.S. 504;
Cotting v. Kansas City Stockyards Co., 183 U. S. 84.

All contracts are inherently subject to the paramount police power of the sovereign the exercise of which is never understood to involve their violation within the meaning of the obligation clause of the constitution.

Constitution of the United States Revised and Amended by Payne 309 and cases.

"There are some kinds of business not confined to the States which are yet not within the classification of interstate commerce and which accordingly Congress has no power to regulate. *Among these is the business of insurance.* It has been held that issuing a policy of fire insurance was not a transaction of commerce; neither is marine insurance, nor life insurance." (Italics ours.)

Constitution of United States Revised and Annotated, 1924, p. 141, citing

Paul v. Virginia, 8 Wall. 168;
Hooper v. California, 155 U.S. 648;
New York Life v. Cravens, 178 U.S. 389;
New York Life v. Deer Lodge County, 231 U.S. 495;
Ducat v. Chicago, 10 Wall. 410;
Philadelphia Fire Assn. v. New York, 119 U.S. 110;
Equitable Life v. Clements, 140 U.S. 226;
Noble v. Mitchell, 164 U.S. 367;
Mutual Life v. Cohen, 179 U.S. 262;
Mutual Life v. Hill, 193 U.S. 551;
Northwestern Life v. McCue, 223 U.S. 234;
Aetna Life v. Moore, 231 U.S. 543;
Provident Sav. Soc. v. Kentucky, 239 U.S. 103;
Northwestern Life v. Wisconsin, 247 U.S. 132.

"Consistent with the power of congress to regulate commerce the state possesses because it was reserved, the power to protect the public health, the public morals and the public safety by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national constitution nor conflict with acts of congress."

Constitution of United States Revised and Annotated, 146, citing

Missouri, etc., R. Co. v. Haber, 169 U.S. 628;
Sioux Remedy Co. v. Cope, 235 U.S. 197;
McLean v. Denver, etc. R. Co., 203 U.S. 38;
Houston, etc. R. Co. v. Mayes, 201 U.S. 321;

Bowman v. Chicago, etc. R. Co., 125 U.S. 489;
Robbins v. Shelby County, 120 U.S. 493;
Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 215;
Railroad Co. v. Husen, 95 U.S. 470;
Lake Shore, etc. R. Co. v. Ohio, 173 U.S. 202;
New York v. Miln, 11 Pet. 138.

"A State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate commerce."

Constitution of United States Revised and Annotated (1924) 147 and cases.

"The business of insurance is *quasi* public in character and the right to engage in it is a franchise at least so far as corporations are concerned and accordingly it is competent for the state, either under its police power or as creator or controller of corporations, to determine who may engage in the business within its boundaries and to prescribe terms and conditions on which the business can be conducted and generally to regulate the business * * *."

32 C. J. 981 and cases too numerous to cite here, which include the case of *Welch v. Fire Ass'n.*, 120 Wis. 456, establishing that rule in Wisconsin.

The state may lawfully require insurance corporations to obtain a license before doing business and pay a license tax and may require the deposit of a fund with the state superintendent of insurance for the security of policy holders and make other regulations and restrictions.

32 C. J. 982.

Among other things the legislature may prescribe a standard form of policy.

32 C. J. 983.

In 12 C. J. sec. 440 the author, after quoting the fourteenth amendment, says:

"* * * It does not deprive the states of their police power, however; and, subject to the limitations expressed therein, the states may continue to exercise their police powers as fully as before the adoption of the amendment."

The author then cites a long list of cases and in sec. 441, after referring to that rule and its limitations, says:

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or *manifest evil* or the preservation of the public health, safety, morals, or *general welfare*, that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, * * *." (Italics ours.)

There can be no question about the "manifest evil" that the Wisconsin statutes were intended to prevent and the "general welfare" that was intended to be protected. That was stressed in the case of *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 550.

Neither the fourteenth amendment nor any other amendment was designed to interfere with the powers of the state; sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to regulate so as to increase the industries of the state, develop its resources and add to its health and property.

Barbier v. Connolly, 113 U.S. 27.

The fourteenth amendment was not intended to hamper or to authorize the courts to interfere with the state's exercise of its police powers to regulate and promote the morals, health and safety of her citizens.

State v. Legendre, 138 La. 154.

The legislature of a state, unlike congress, has all the power of legislation from which it is not prohibited by express words of the constitution or by necessary implications therefrom, and the unconstitutionality of a statute must be clear and manifest before a court should declare it unconstitutional, and if there be any reasonable doubt on the subject, the law should be upheld.

Northwestern National Bank v. Superior, 103 Wis. 43.

State control of foreign companies

An insurance company doing business in another state is subject to the laws of that state as to such business.

N.Y. Life Ins. Co. v. Fletcher, 117 U.S. 519.

Corporations doing marine insurance may, like other companies, be entirely excluded from doing business in a state.

Hooper v. California, 155 U.S. 648.

A state may impose conditions not in conflict with the constitution or laws of the United States on business within its territory of an insurance company chartered by another state or may exclude such company from its territory, or if it has given a license, it may revoke such license.

Doyle v. Continental Ins. Co., 94 U.S. 535, 536;
and list of cases cited in
3 Digest U.S. Sup. Ct. Rp. 3406.

A law of a state requiring insurance companies of other states to file security or take out a license or pay a specific tax or fee and percentage before they can issue policies in the state is held to be constitutional.

Home Ins. Co. v. Augusta, 93 U.S. 116;
Postal Telegraph C. Co. v. Charleston, 153 U.S. 692.

The fourteenth amendment does not prohibit the state from imposing such conditions upon foreign corporations as it may choose as a condition of their admission within its limits.

Norfolk & W. R. Co. v. Penn., 136 U.S. 114;
Tolerton & Stetson Co. v. Barck, 84 Minn. 497, 88 N.W. 19;
Philadelphia Fire Ass'n v. N.Y., 119 U.S. 110.

Where an insurance policy is delivered, that is the locus of the contract and a suit can only be brought on the contract as contained in the policy.

Keim v. Home Mutual Fire and Marine Ins. Co. of St. Louis, 97 Am. Dec. 291.

Where this insurance contract is delivered

This is not the case of an ordinary purchase of goods by a mail order in which, under the general rule, the buyer makes the postal department his agent for carrying and delivering the letter and also makes the railroad his agent for the purpose of bringing the goods back to him, which makes the delivery at the place of shipment.

In this case, the certificate had to be sent by the insurance company to the purchaser, not on his order or at his request, but because of the contract duty of the insurance company to send to the purchaser this certificate insurance contract when notified by the Chrysler Sales Corporation, which makes the postal department the agent of the insurance company for the purpose of delivering said policy to the purchaser of the car, so that the delivery of the certificate insurance contract is not complete within the terms of the master policy until delivered in Wisconsin and the provision in the contract that if the certificate should fail to reach the purchaser of the car, that the insurance company

would still be liable, does not change this rule, because if the purchaser of the car sued, in case of loss, he would have to sue on the certificate policy and prove that in order to recover, so that provision would only be a substituted form of delivery.

G. A. Gray Co. v. Taylor Bros. Iron Works, 66 Fed. 686.

Jurisdiction

It is a fundamental rule of law that neither a sovereign, nor its public officers as such, can be sued in its own courts, or in any other courts, unless the sovereign has given its express voluntary permission and consent thus to be sued. This immunity from suit is possessed by the several states and preserved to them by the eleventh amendment to the United States constitution, which prevents the bringing of suits against them either in the state or federal courts.

A discussion of the above principle is contained at length in the case of *Fitz v. McGhee*, 172 U.S. 516. In that case the receivers of a railroad brought suit against the attorney general and the solicitor of the state of Alabama to restrain them as officers of the state from taking steps to enforce the provisions of a law of that state reducing the tolls on a bridge owned by the railroad. It was held that this was a suit against the state and the legislature not having granted any express permission for such a suit, it could not lie. Mr. Justice Harlan delivered the opinion of the court, reviewed former decisions and discussed at some length the principle involved. The discussion starts on page 525 and continues through the opinion, the crux of the opinion being that there is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and the suit against officers of

a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. It was held that under the first of the above theories, the officers could be enjoined from proceeding, but under the second they could not. It was conceded that one against whom an action was threatened could raise the constitutionality of the statute under which the action was threatened or started in a proper proceeding—that proper proceeding being in the court where the party raising the question was a defendant.

The theory of this case is that a person or corporation cannot enjoin the state officers from acting under the statutes of the state where the officers propose to act only by formal judicial proceedings in the courts of the state.

The eleventh amendment of the United States constitution is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign State."

In the case of *Beers v. State of Arkansas*, 20 How. (U.S.) 527, the court said:

> "It is an established principle of Jurisprudence in all civilized nations, that the Sovereign cannot be sued in its own courts, or in any other, without its consent and permission."

Likewise, in the case of *Nichols v. U. S.*, 7 Wall. 122, the court said:

> "Every Government has an inherent right to protect itself against suit, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamentally applied to every Sovereign power and but for the protection which it

affords, the Government would be unable to perform the various duties for which it was created."

The very basis of all state statutory legislation referring to insurance companies, rests entirely upon the fundamental proposition that the business of insurance is affected with a public interest, and therefore is a proper subject for the exercise of the police power of the state.

German Alliance Insurance Co. v. Kansas, 233 U.S. 389.

In the case of the *German Alliance Insurance Company v. Hale*, 219 U.S. 307, the Supreme Court said at the bottom of page 316:

"They (regulations) are enacted under the power with which the States have *never* parted, of caring for the *common good* within the limits of constitutional authority. Insurance companies, indeed all corporations, associations and individuals, within the jurisdiction of a State, are subject to such regulations, in respect to their relative rights and duties, as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good. *Jacobson v. Massachusetts*, 197 U.S. 11, 27, 31; *Lake Shore, etc., v. Ohio*, 173 U.S., 285, 297; *House v. Mayes, ante*, p. 270 * * * It was for the State, keeping within the limits of its constitutional powers to say what particular means it would prescribe for the protection of the public in such matters."

Thus, the power to deal with insurance companies is a sovereign power which has, at all times, reposed in the sovereign state of Wisconsin ready to be exercised at the will of the sovereign and in the manner willed by the sovereign.

The sovereign has now exercised its will by the enactment of certain state insurance laws.

In the case of *Providence etc. Co. v. Virginia Fire Insurance Co.*, 11 Fed. 284, the court, at page 287 said:

"The Insurance Superintendent is a public officer of the state, created by the statute, and charged with the execution of the laws in relation to insurance."

The Allgeyer case

This scheme was apparently designed for the express purpose of evading the provisions of the Wisconsin statute and the statutory limitations in other states, and it was claimed in the lower court to be justified by the decisions of the supreme court in the case of *Allgeyer v. Louisiana*, 165 U.S. 578, but we think this scheme presents just the opposite of the *Allgeyer* case. In that case Allgeyer was a resident of Louisiana, but while in New York, he secured from the Atlantic Mutual Insurance Company of New York a so-called master policy contract of insurance on cotton to be shipped to ports in Europe.

When Allgeyer so shipped cotton, he drew a bill of exchange against the purchaser attaching to the same bill of lading for the cotton and an order on the Atlantic Mutual Insurance Company for a separate insurance policy contract as provided for in the master policy to be delivered in New York on presentation of the order issued on the insurance company. The insurance company in New York on such order issued and delivered to the holder of the exchange and order in New York as Allgeyer's agent, the separate policy or certificate of insurance on the cotton in accordance with the master policy contract. There the new separate policy contract as well as the so-called master policy contract was delivered in New York, the separate policy contract being so delivered to the holder of the bill of exchange in New York. The holder of the bill of exchange in New York became the owner of the cotton covered by the bill of lading attached and was the owner of the policy of insurance covering the same, which was so issued and delivered complete in New York and the court held that the contract of insurance being so made and delivered

in New York by an insurance company of the state of New York where the premiums were paid and where the losses, if any, were to be paid, was just as absolutely a New York insurance as if Allgeyer had gone to New York in person and received the policy there as he did the master policy. In this case, according to this contract, this insurance policy or certificate contract of insurance is to be issued and sent by mail by the insurance company from Detroit to the purchaser of the car in Wisconsin, not on his order or at his request but on notice by the Chrysler Sales Corporation because of a contract duty imposed upon the insurance company by the Chrysler Sales Corporation which makes the postal department the agent of the insurance company to deliver that insurance policy to the purchaser of the car in Wisconsin.

In the *Allgeyer* case, both the master policy and the certificate policy were issued and delivered in New York, while here, this certificate contract of insurance which is the actual insurance policy as to the insured citizen of Wisconsin, is drawn in Detroit but delivered to the purchaser of the car in Wisconsin through the postal department which is the agent of the insurance company in the delivery of the policy in the performance of the duty imposed upon the insurance company by the provisions of the master policy, so-called which required the insurance company to send and deliver the separate insurance policy contract to the purchaser of each car in Wisconsin when notified of the name and address of such purchaser.

Clearly, the *Allgeyer* case should not be permitted to be used by this plaintiff or by its insurance company as a justification of its wholesale manner of carrying on this insurance business in the state of Wisconsin in defiance of its laws which were designed for the protection of its citizens against wildcat insurance schemes by irresponsible, unexamined, uncontrolled and unlicensed insurance companies, for the more irresponsible an insurance

company is, the more attractive insurance contracts it can make. If this insurance company can evade the laws of Wisconsin in this way, then every other insurance company can do business in the same way. If the insurance commissioner has no supervision over it and can make no investigation as to the responsibility of the company or the honesty of its scheme of insurance, then there is no way for a state to protect its citizens against fraud by irresponsible insurance companies or worthless insurance contracts, although that is a well recognized police power of the state. The court should not lend itself to a scheme like this to evade the laws of the state which the legislature has deemed reasonable and necessary for the protection of its citizen.

Of course, the right of a citizen or resident of Wisconsin to purchase insurance anywhere in the country is a constitutional right guaranteed to the citizen. A citizen of Wisconsin may go to Michigan and there make a contract with a foreign insurance corporation and Wisconsin can have no control over such a contract. A citizen of Wisconsin may use, in another state, any agency he desires for the purpose of purchasing insurance in that state. He may send a message or write a letter to an insurance corporation in another state and thereby purchase insurance, or he may employ an agent in another state to purchase insurance for him. So long as the company with which he is dealing does not come within the state in person or by agent (as in this case by the postal department) to do such business of insurance in this state or to perform any act in perfecting such a contract of insurance or in adjusting a loss here, it may deal with our citizens.

But the moment a foreign insurance corporation comes into the state to deal with a citizen or resident for the purpose of effecting a contract of insurance or if it issues a policy in another state on property located in Wisconsin by the terms or conditions of which a loss, if any should accrue, must be adjusted in the state, it is doing the business of insurance in Wisconsin.

Lumbermen's Ins. Co. v. Meyer, supra.

In this case the Palmetto Fire Insurance Company has entered into a tripartite agreement containing a plan through and by which it is enabled to have done for it in the State of Wisconsin all of the things a domestic company or an admitted company can do in the State to sell fire and theft insurance and to collect the premiums thereupon and adjust the losses resulting under the insurance effected, and the things are done for it in the State by residents of the State. Without the doing of such things in the State it could not carry out the agreement it has made with the Chrysler Company.

We submit the principle we are contending for in this case is clearly recognized by this Court in the *Allgeyer* case, *supra*, in the following language at page 583:

> "There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. *The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders*, and unless the conditions be compiled with, the prohibition may be absolute."

Corporations, status of

While corporations are persons for many purposes, they are not citizens of the United States within the meaning of sec. 1 art. XIV of the United States Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That language is very specific—"all persons born or naturalized," excludes the idea of a corporation.

The lower court did not discuss this feature of the case at length because it sustained the statutes under the police power to regulate insurance, but the opinion of the court, on page 583, recognizes that as the general rule in the following language:

> "There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders and unless the conditions be complied with, the prohibition may be absolute."

We will again brief this question at length here because we think the statutes may be sustained on either or both grounds. All of the large text writers give that as the effect of the constitutional provision as construed by the courts.

> "Corporations are not citizens within the meaning of this clause (Fourteenth Amendment). The term citizens as there used applies only to natural persons, members of body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed."
>
> Constitution of United States Revised and Annotated, 509, citing
>
> *Paul v. Virginia*, 8 Wall. 177;
> *Blake v. McClung*, 172 U.S. 239;
> *Norfolk, etc. R. Co. v. Pennsylvania*, 136 U.S. 114;
> *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28;
> *Augusta Bank v. Earle*, 13 Pet. 586.

"The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State."

Constitution of United States Revised and Annotated 510, citing

Crutcher v. Kentucky, 141 U.S. 59;
Allgeyer v. Louisiana, 165 U.S. 583;
Doyle v. Continental Ins. Co., 94 U.S. 540;
Ducat v. Chicago, 10 Wall. 410;
Liverpool Ins. Co. v. Massachusetts, 10 Wall. 573;
American Ins. Co. v. King Lbr. etc., Co., 250 U.S. 2;
Chalker v. Birmingham, etc., R. Co., 249 U.S. 522.

See also Constitution of United States Revised and Annotated, page 141 and cases.

The insurance business so affects the public interests that it justifies legislative regulation, and because of such fact the liberty of contract guaranteed by the fourteenth amendment is not applicable. The wisdom of such a law is for the legislature; the court can only inquire as to the power of the legislature to act on the subject.

German Alliance Ins. Co. v. Kansas, 233 U.S. 389.

It is a well established principle of law that a corporation, being a mere creation of a particular state has no power or right to act or do business outside of that state except with the consent, express or implied, of such other state. A corporation is not a "person born or naturalized" within the meaning of the fourteenth amendment guaranteeing equal protection of the laws and the law of comity of states does not apply where there is an express statutory provision like the insurance laws of Wisconsin, expressly prohibiting it.

8 Fletcher Cyclopedia of Corporations, sec. 5734, *et seq.*

As to insurance corporations, see

8 Fletcher Cyclopedia of Corporations, sec. 5776, *et seq.*;

22 Cyc., 1386-1391, *et. seq.;*
32 C. J. page 951, *et seq.;*
1 Joyce on Insurance, 328, *et seq.*

"* * * It is a settled principle of constitutional law that a corporation is not a citizen within the meaning of that clause of the constitution of the United States which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' "

10 Cyclopedia of Law and Procedure, 150;
Ducat v. Chicago, 48 Ill. 172, 95 Am. Dec. 529;
Tatem v. Wright, 23 N. J. L. 429;
People v. Imlay, 20 Barb. (N.Y.) 68;
Wheeden v. Camden, etc. R. Etc., Co., 2 Phila. (Pa.) 23.

"A corporation is not a 'citizen' within the meaning of constitutional provisions which forbid the grant to any citizen or class of citizens of privileges not equally open to all citizens. In fact, the corporate charter itself and all the powers conferred on the corporation as such are in the nature of special privileges not possessed by individuals, and it is within the police power of the legislature to grant a large measure of powers to corporations without infringing constitutional provisions forbidding the grant of special privileges to some persons that are not open to others. * * *."

12 C. J. 1113;
In re Wyoming Valley Co-op. Assoc., 198 Fed. 436;
Anglo-California Bank v. Field, 146 Cal. 644.

"A corporation not being a citizen within the meaning either of the constitution as originally adopted or of the fourteenth amendment, it follows that a state may prohibit foreign corporations from doing business within its boundaries or may grant such privilege on such conditions as it deems best, and may likewise impose certain conditions on the right of a foreign corporation to sue in its courts."

12 C. J. 1121.

It is true that the state may regulate the activities of foreign corporations within the state.

St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 67 L. Ed. 297, 34 Sup. Ct. 125.
Selover v. Walsh, 226 U.S., 112;
Ducat v. Chicago, 10 Wal. 410, 19 L. ed. 972;
Wilson-Moline Buggy Co. v. Hawkins, 80 Kan. 117, 101 P 1009.

The business of insurance is *quasi* public in character and the right to engage in it is a franchise, at least so far as corporations are concerned, and accordingly, it is competent for the state, either under its police power or as creator or controller of corporations to determine who may engage in the business within its boundaries and to prescribe terms and conditions on which the business may be conducted, and generally to regulate the business and all persons engaged in it whether as individuals, partnerships, voluntary associations or corporations.

32 C. J. 981;
National Union F. Ins. Co. v. Wanberg, 42 S. Ct. 32;
German Alliance Ins. Co. v. Kansas, 233 U.S. 389;
John Hancock Mut. L. Ins. Co. v. Warren, 181 U.S. 73.
Doyle v. Continental Ins. Co., 94 U.S. 535, 542;
Security Mutual Ins. Co. v. Prewitt, 202 U.S. 246, 257.

Contracts of insurance fall within the police power of the state and may be regulated in the interests of the public.

32 C. J. 983;
Gen. Acc. Assur. Co. v. Walker, 99 Miss. 404, 55 So. 51;
Verducci v. Casualty Co. of America, 96 Ohio St. 260, 117 N.E. 235.

The state has power either to wholly exclude a foreign insurance company from doing business within its limits or to impose

on the company such terms and conditions as it may deem proper as a condition precedent to its right to do business within the state. A state having the power to exclude foreign companies entirely, has the power to change the condition of admission at any time for the future.

32 C. J. 989;
Whitfield v. Aetna L. Ins. Co., 205 U.S. 489, 27 S. Ct. 578;
Philadelphia F. Assoc. v. New York, 119 U.S. 110, 7 S. Ct. 108.

If there are specific provisions as to foreign companies, such companies may do business in the state only on compliance with such conditions.

32 C. J. 991;
Mitchell v. National Surety Co., 206 Fed. 807;
Fletcher v. New York L. Ins. Co., 13 Fed. 526.

Owing to the power of a state absolutely to exclude foreign corporations from its boundaries, it may prescribe such conditions of admission not in conflict with the Federal Constitution as it desires.

14 R. C. L. 861;
Doyle v. Continental Ins. Co., 94 U.S. 535, 24 U.S. (L. ed.) 148;
Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 U.S. (L. ed.) 832;
Noble v. Mitchell, 100 Ala. 519.

"* * * It is uniformly held that a foreign corporation has no absolute right of recognition in other states, that it depends for its recognition and the enforcement of its contracts upon their assents, and a state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business within its limits. * * * "

Scottish Union & National Ins. Co. v. Herriott, 80 N. W. 665, 667 and cases.

In the case of St. Louis & S. F. R. Co. v. Cross, 171 Fed. 480, the court said, page 488:

"* * * Undoubtedly *it is a general rule* that foreign corporations enter a state to carry on business therein by comity only, and that a state may at will exclude them, admit them on conditions, or terminate its permission once given to continue such business."

That is especially true as to foreign insurance companies because of the character of the business they do. It was held, *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, that because

"a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withhold that permission once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

"It is well established that this state (Wisconsin) has the right to impose conditions upon foreign insurance companies doing business here when such conditions are not in conflict with the constitution or laws of the United States. * * *."

Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 284, and cases.

"* * * We are aware of no rule of comity which requires our courts to enforce the contract of a foreign corporation with a resident of this state in conflict with the letter and policy of our laws, whether the contract be made within or without the state. * * *."

Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 285, and cases.

"* * * The rule of comity claimed by respondent would place

foreign corporations on more favorable ground in the transaction of insurance business with residents of this state than domestic corporations and foreign corporations duly licensed. The rule of comity does not go to this extent."

Id. at 285, and cases.

Appellant has questioned the constitutionality of the Wisconsin statutes, but it has been held that a foreign corporation has no right to challenge the constitutionality of a state statute which regulates its admission into the state, and it is immaterial how onerous or even impossible the condition on which the original admission of a foreign corporation depends, since, in any event, no right of such corporation can possibly be invoked. That is because all the right a foreign corporation has to do business in a state must be found in whatever law the legislative assembly passes in that behalf, and even if such law would be unconstitutional, if attached by a citizen of the state, still it would avail a foreign corporation nothing to attack it, as such corporation is not a citizen entitled to all privileges and immunities of citizens in the several states.

12 R. C. L. 62;
Munday v. Wis. Trust Co., 252 U.S. 499.

This Wisconsin corporation as a sales corporation cannot force this foreign insurance company or its business into the state of Wisconsin if the insurance company cannot.

A corporation not being a citizen within the meaning either of the constitution as originally adopted or of the fourteenth amendment, it follows that a state may prohibit foreign corporations from doing business within its borders or it may grant such privilege on such condition as it deems best.

12 C. J. 1121;
12 R. C. L. 6-10;

Selover v. Walsh, 226 U. S. 112;
Berea College v. Kentucky, 211 U.S. 45;
Ducat v. Chicago, 10 Wall. 410;
Independent Tug Line v. Lake Superior Lumber Co., 146 Wis. 121;
Loverin & Browne Co. v. Travis, 135 Wis. 322;
Milwaukee Fire Dept. v. Helfenstein, 16 Wis. 136.

A corporation is not a citizen within the meaning of the fourteenth amendment to the constitution and a state may prohibit it from doing business when organized under the laws of another state or it may prescribe the terms on which such business may be done.

12 C. J. 1143;
Paul v. Virginia, 8 Wall. 168;
Frazier v. Wilcox, 4 Rob. (La.) 517;
Northwestern Nat. Ins. Co. v. Riggs, 203 U.S. 243.

A state may place conditions or restrictions on the doing of certain kinds of business and among others, fire insurance.

12 C. J. 1124;
Daggs v. Orient Ins. Co., 136 Mo. 382.

In the late case of *Fidelity & Deposit Co. v. Tafoya et al.*, 70 L. Ed. 379 (Advance Sheet) this court assumed that it is the established law "that the state has the power and constitutional right arbitrarily to exclude the plaintiff (a foreign corporation) without other reason than that such is its will," except in the instances there specified, none of which apply to this case. In that case the corporation had been regularly admitted to do business in the state. It was like the recent New York *Chrysler* case.

When a foreign corporation has been regularly admitted to

transact business in a state, then it is a person within the meaning of the statutes regulating persons.

12 C. J. 1142;
Louisville R. Co. v. Gaston, 216 U. S. 418;
Head v. N. Y. L. Ins. Co., 241 Mo. 403, 147 N.W. 827.

A foreign corporation which has not been regularly admitted to do business in the state, although doing business therein, does not come within the protection of the fourteenth amendment.

12 C. J. 1142;
Blake v. McClung, 172 U. S. 239;
Philadelphia Fire Assn. v. N. Y., 119 U. S. 110.

It is not a person "within its jurisdiction." The inherent right of a corporation is by no means the same as the rights of an individual.

State v. Central Lumber Co., 24 S.D. 136, 123 N.W. 504.

The business of insurance is recognized to be one affected with a public interest and is a proper subject for the exercise of the police powers of the state.

14 R. C. L. 857;
McCarther v. Firemen's Ins. Co., 74 N. J. Eq. 372;
German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

Owing to the power of a state absolutely to exclude foreign corporations from its boundaries, it may prescribe such conditions of admission not in conflict with the federal constitution as it desires.

14 R. C. L. 861;
12 R. C. L. 10;
Doyle v. Continental Ins. Co., 94 U. S. 535.

Insurance business and issuing insurance contracts is not commerce, and for that reason there is no interference with interstate commerce by a statute requiring every insurance company transacting business in the state to be taxed annually on the excess of premiums received over losses and ordinary expenses incurred during the year.

14 R. C. L. 858;
N. Y. Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495.

The doctrine of comity permits but does not require, so that the legislature of a state may permit or license a foreign corporation to do business in the state or it may prohibit it. Accordingly, a corporation may go into another state if not prohibited by the latter's constitution or statute, and make any contract or acquire any property which is within the powers conferred by its charter and it may maintain actions to enforce its rights.

8 Fletcher Cyc. Corp., sec. 5736.

The recognition of a corporation's existence by other states and the enforcement of its contracts made therein, depends purely upon the comity of those states—a comity which is never extended where the existence or the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy.

8 Fletcher Cyc. Corp., sec. 5736, p. 9381.

Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contract upon their assent, it follows as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, or they may restrict its business to

particular locations or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in the judgment of such state.

8 Fletcher Cyc. Corp., sec. 5736, p. 9381;
Paul v. Virginia, 8 Wall. 168.

Where a corporation does business in such state, it will be presumed to have assented to the terms so imposed.

8 Fletcher Cyc. Corp., sec. 5736, p. 9381;
St. Clair v. Cox, 106 U. S. 350.

Chief Justice Waite said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty,' * * * though it may do business in all places where its charter allows *and the local laws do not forbid.* * * *." (Italics ours.)

8 Fletcher Cyc. Corp., sec. 5737, p. 9384;
Waters Pierce Oil Co. v. Texas, 177 U. S. 28.

Comity does not supply corporate powers nor confer corporate capacity. It merely enables a body of corporators chartered by one state to act in a corporate capacity in another state, *subject to all the laws and regulations of the latter state.*

8 Fletcher Cyc. Corp., sec. 5737, p. 9385;
Martin v. Watson Nav. Co., 239 Fed. 188;
Seattle Gas & Electric Co. v. Citizens L. & P. Co., 123 Fed. 588;
Relfe v. Rundle, 103 U. S. 222.

No state need allow a corporation created by another state or country to do business within its jurisdiction unless it chooses to do so.

8 Fletcher Cyc. Corp., sec. 5737, p. 9386;

Relfe v. Rundle, 103 U. S. 222;
Backover v. Life Assn. of America, 77 Va. 85;
St. Louis and S. F. R. R. Co. v. Cross, 171 Fed. 480.

The laws of comity between nations or between states of the Union do not require a country or state to allow a foreign corporation to do business or hold property within its limits or require the courts of such country or state to enforce its contracts made within the state or otherwise to recognize it, when to do so would violate an express provision of the constitution or laws of the state.

8 Fletcher Cyc. Corp., sec. 5738, p. 9387;
Blake v. McClung, 172 U. S. 239;
Canada Southern R. R. Co. v. Gebhard, 109 U. S. 529;
Paul v. Virginia, 8 Wall. 168;
Runyan v. Coster, 14 Pet. 122;
Bank of Augusta v. Earle, 13 Pet. 519;
Baldwin Tool Works v. Blue, 240 Fed. 202; also a long list of other cases cited in the note.

Every power which a corporation exercises within a state other than that by which it was created, depends for its validity upon the law of the state in which it is exercised and a corporation can make no valid contract without the sanction, express or implied, of such state.

Runyan v. Coster, 14 Pet. 122.

Having no absolute right of recognition in another state, but depending for such recognition and the enforcement of such contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose.

8 Fletcher Cyc. Corp., sec. 5738, p. 9390;
Paul v. Virginia, 8 Wall. 168.

When a corporation goes into another state to do business, it must do such business there according to the laws of such state.

Id. 9390.

Even though there be no statutory provision modifying or withdrawing the extension of the rule of comity to foreign corporations, the law of comity between states does not require a state to allow a foreign corporation to do business or hold property within its limits, or require the courts to enforce its contracts made within the state or otherwise recognize them when to do so would be contrary to its public policy.

8 Fletcher Cyc. Corp., sec. 5740, p. 9399;
Waters-Pierce Oil Co. v. State, 177 U. S. 28;
American & Foreign Christian Union v. Yount, 191 U. S. 352;
Cowell v. Colorado Springs Co., 100 U.S. 55;
Bank of Augusta v. Earle, 13 Pet. 519;
Mannington v. Hocking Valley Ry. Co., 183 Fed. 133;
Blodgett v. Lanyon Zinc Co., 120 Fed. 893;
Clark v. Central R. R. & Banking Co., Georgia, 50 Fed. 338;
Knott v. Southern Life Ins. Co., 2 Woods 479, Fed. Cas. No. 7894.

Then follows a long list of cases from state courts.

See 8 Fletcher Cyc. Corp., sec. 5740, pp. 9400, 9401, 9402.

It is the legislative and not the judicial power in the state that must control and give shape to its public policy. With this power the courts have not been entrusted.

8 Fletcher Cyc. Corp., sec. 5742, p. 9405 and cases cited.

By the law of comity among nations, a corporation created

by one sovereignty is permitted to make contracts in another. The same law of comity prevails among several states of the union provided such contracts are not prohibited by the laws of such state or contrary to their public policy.

8 Fletcher Cyc. Corp., sec. 5746, p. 9426, and cases cited;
American & Foreign Christian Union v. Yount, 101 U. S. 352;
Runyan v. Coster, 14 Pet. 122;
Bank of Augusta v. Earle, 13 Pet. 519.

We do not think this rule is affected by interstate commerce because an insurance policy or contract is not a subject of interstate commerce, but if it were, we do not think it would prevent this police regulation for the benefit of the citizens of the state. Police powers not delegated to the general government reside in the state as an inherent attribute of sovereignty.

8 Fletcher Cyc. Corp., sec. 5765, p. 9543;
Hendrick v. Maryland, 235 U. S. 610;
Missouri K. & T. R. Co. v. Harris, 234 U.S. 412;
Central of Georgia R. Co. v. Groesbeck, 175 Ala. 189;
Sligh v. Kirkwood, 65 Fla. 123;
People v. Chicago, I. & L. R. Co., 223 Ill. 581;
Railroad Comm. of Indiana v. Grand Trunk Western R. Co., 179 Ind. 255;
Willfong v. Omaha & St. L. R. Co., 116 Iowa 548;
Kaw Valley Drainage Dist. v. Missouri Pac. R. Co., 99 Kan. 188;
State v. Chicago, M. & St. P. R. Co., 136 Wis. 407.

It was not intended by the fourteenth amendment to abridge the police power reserved to the states but only to prevent them from acting arbitrarily and in a manner having no reasonable relation to the end sought to be attained.

8 Fletcher Cyc. Corp. 9543;
Broadnax v. Missouri, 219 U. S. 285;

House v. Mayes, 219 U. S. 270;
Lochner v. New York, 198 U. S. 45;
Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26;
Sutton v. New Jersey, 244 U. S. 258;
Mugler v. Kansas, 123 U. S. 623.

And the states may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce.

8 Fletcher Cyc. Corp., sec. 5765, p. 9546;
Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412;
Kansas City Southern R. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75;
Central of Georgia R. Co. v. Groesbeck, 175 Ala. 189;
Southern Ry. Co. v. Railroad Comm. of Ind., 179 Ind. 23;
Atlantic Coast Line Ry. Co. v. Comm., 102 Va. 599.

Insurance not commerce

The business of insurance as ordinarily conducted is not commerce and a state may absolutely exclude a foreign insurance company from doing business within the state or may permit it to come within the state under such restraints and regulations as the state may choose.

8 Fletcher Cyc. Corp., sec. 5776, p. 9624;
Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132;
People v. Fidelity & Casualty Co. of N. Y., 153 Ill. 25;
State v. Insurance Co. of No. America, 115 Ind. 257;
Scottish Union & National Ins. Co. of Edinburgh, Scotland, etc. v. Herriott, 109 Iowa 606;
State v. Phipps, 50 Kan. 609;
Com. v. Gregory, 121 Ky. 256;
Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485;
Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281;

South Carolina v. McMaster, 237 U. S. 63;
Thames & M. M. Ins. Co. v. U. S., 237 U. S. 19.

At the present time, practically every state in the union has passed laws in regard to insurance companies organized under the laws of sister states, so that it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse and in this respect there is no difference whatever between insurance against fire and insurance against perils of the sea or against the uncertainty of man's mortality. The issuing of a policy of insurance is not a transaction of interstate commerce though the parties may be domiciled in different states. The state having the power to impose conditions on the transaction of business of foreign insurance companies within its limits has the equal right to prohibit the transaction of such business by agents of such companies or by insurance brokers who are to some extent the representatives of both parties.

Taxation of foreign insurance corporations cannot be assailed as an unconstitutional interference with or regulation of interstate commerce.

8 Fletcher Cyc. Corp., sec. 5776, pp. 9624-9629;
State v. Phipps, 50 Kan. 609;
N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389;
State v. Ins. Co. of No. America, 71 Neb. 320;
Hooper v. California, 155 U.S. 648;
Philadelphia Fire Assn. v. N. Y., 119 U.S. 110;
Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357;
Nutting v. Massachusetts, 183 U. S. 553;
Allgeyer v. Louisiana, 165 U. S. 578;
Northwestern Mut. L. Ins. Co. v. Lewis & Clarke Co., 28 Mont. 484;

People v. National Fire Ins. Co. of Hartford, 27 Hun (N. Y.) 188, etc.;
St. Louis and S. F. R. Co. v. Cross, 171 Fed. 480;
Security Mut. Life Ins. Co. v. Prewitt, 202 U.S. 246.

With the right of a state to regulate or prohibit an insurance company of another state from doing business in the state for the protection of the citizens of such state so generally recognized and established by both state and federal decisions, we confidently assert that the provisions of the Wisconsin Statutes made for the protection of its citizens against irresponsible insurance companies or worthless insurance contracts are reasonable and designed only for the protection of its citizens against fraud and deceit.

A fire insurance company transacting business in a foreign state is bound in respect to such business by the laws of the state where the business is transacted.

10 Fletcher Cyc. Corp. (1921 Sup.), sec. 5730, p. 888;
American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. 2, 63 L. Ed. 810.

A corporation is not a citizen within the meaning of the provision of the constitution which secures the privileges and immunities of citizens against state legislation.

American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. 2, Note at p. 10;
Orient Ins. Co. v. Daggs, 172 U. S. 557.

A state may prescribe the terms upon which alone it will permit foreign corporations to do business within its borders. It may impose any condition it desires. Foreign corporations may be compelled to take out a license as a condition of doing business.

10 Fletcher Cyc. Corp., sec. 5734, p. 888;
Kluver v. Middlewest Grain Co., 173 N. W. 468;

Indiana Harbor Belt R. Co. v. Green, 289 Ill. 81, 124 N. E. 298;
Dixon v. Northwestern Nat. Life Ins. Co., 179 N. W. 885.

A corporation is not entitled to the privileges and immunities of citizens of the several states and of the United States.

10 Fletcher Cyc. Corp., sec. 5754, p. 890;
Adams v. American Agricultural Chemical Co., 82 S. C. 850;
Bethlehem Motors Co. v. Flint, 178 S. C. 399, 100 S. E. 693.

A foreign corporation which cannot sue in a state court because of failure to comply with state requirements, cannot sue to enforce its rights in the federal court.

Utah Const. Co. v. St. Louis Const. & Equip. Co., 254 Fed. 321.

Certainly these companies could not sue in the state courts to enforce any rights arising out of violation or defiance of the laws of the state.

On the question of what is doing business in the state, it is held that the collection of premiums constitutes doing business in a state and that soliciting insurance and delivering policies in a sister state constitutes doing business in such state.

10 Fletcher Cyc. Corp., sec. 5938, p. 908;
Hagler v. Security Mut. Life Ins. Co., 244 Fed. 863;
Dixon v. Northwestern Nat. Life Ins. Co., 179 N. W. 885.

We think it must be held under sec. 209.05 of the Wisconsin statutes under this method of selling Chrysler cars including insurance policies as a part consideration thereof, that the wholesale purchaser or agent in Wisconsin is an insurance agent of this insurance company selling insurance in Wisconsin on each auto-

mobile sold, for he not only sells the insurance, but receives the premium or consideration therefor as a part of the purchase price of the cars sold, and notifies the company for the purpose of having the policy issued.

Wisconsin cases

In the case of *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 284, the court said:

"In order to correctly construe secs. 1770*a*-1770*e*, Stats. 1898, as amended by ch. 399 Laws of 1901, placing burdens upon the exercise by foreign corporations of their corporate franchises in this state, we must proceed in the light of two well-established fundamental doctrines or principles: First, that neither by constitutional provision nor otherwise has a foreign corporation the right to exercise such franchises in other than its parent jurisdiction, and that it is not a citizen either of any state or of the United States, within the provision of either sec. 2, art. IV, of the Constitution of the United States, or sec. 1 of the XIVth amendment to that constitution, protecting such citizens against the denial of certain rights by any state. *Paul v. Virginia*, 8 Wall. 168; *Waters-Pierce O. Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518; *Ashland L. Co. v. Detroit S. Co.*, 114 Wis. 66, 78, 89 N. W. 904. Secondly, however, that it is the policy of this state, settled from its earliest existence, to accord to foreign corporations, by comity, full and complete privilege to exercise their corporate franchises within this state except so far as limitation is imposed by express legislation. *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387; *Wyman v. Kimberly-Clark Co.*, 93 Wis. 554, 559, 67 N. W. 932."

While that rule was stated as the established law of the state, it was held in that case that because the loan and mortgage involved in the case had been given before the enactment of the statute 1770*b*, that that section would not prevent corporations from holding the mortgage or foreclosing it in case of default.

In the case of *Loverin and Browne Co. v. Travis*, 135 Wis. 322, 328, the Wisconsin court again said with reference to section 1770*b*:

"* * * It is enacted under the undoubted power of every state to impose conditions in absolute discretion upon granting the privilege of doing business in this state to any foreign corporation. *Paul v. Virginia*, 8 Wall. 168; *Chicago T. & T. Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940. That power is not restrained by sec. 2, art. IV of the federal constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, nor by sec. 1, amend. XIV, to that constitution, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, because foreign corporations are not citizens. *Paul v. Virginia, supra; Chicago T. & T. Co. v. Bashford, supra.*"

That case, however, involved the sale and transfer of merchandise from a citizen in Illinois to a citizen in Wisconsin, which involved the right of the United States to regulate commerce with foreign nations and among the several states. The court, on pages 330-331, said:

"* * * Parenthetically it may be said, for accuracy, that it has been decided that the traffic or intercourse, in order to constitute commerce or a part thereof, must relate to some merchantable commodity, or at least that it is not sufficient that it relate to a contract of insurance (*Paul v. Virginia*, 8 Wall. 168), or to communications of instruction across state lines (*International T. Co. v. Peterson*, 133 Wis. 302, 113 N. W. 730); a qualification obviously of no importance here, for the subject of whatever transactions were had was groceries, naturally and customarily the subject of barter and sale,"

which clearly comes under the commerce clause of the constitution, but no mercantile commodity is involved in the transaction here. It is a mere question of the right of a foreign cor-

poration to do insurance business in defiance of our laws.

The case of *F. A. Patrick & Co. v. Des Champ*, 145 Wis. 224, was an action by a corporation of Minnesota to foreclose a mortgage given for goods purchased outside the state, and the court held that the transactions were unquestionably acts of interstate commerce, citing *Greek-Am. S. Co. v. Richardson D. Co.*, 124 Wis. 469. The court says sec. 1770*b* has no application to interstate commerce because the exclusive power to regulate such commerce is vested in the congress of the United States. The court there further says that there must be read into the section an exception of such business as constitutes interstate commerce and an exception of such property as is acquired, held or disposed of in this state carrying on interstate commerce. It will be noticed that that question involves property as a subject of interstate commerce which would not involve insurance.

That case was followed in the following cases which are all cases involving interstate commerce of goods.

Jerome P. Parker-Harris Co. v. Kissel Motor Co., 165 Wis. 518;
Elwell v. Adder Machine Co., 136 Wis. 82;
Duluth Music Co. v. Clancy, 139 Wis. 189.

So that if this plaintiff or the Palmetto Fire Insurance Company was selling merchandise as an article of commerce, their rights might be protected under the commerce clause of the constitution, but this case involves the simple question of the right of plaintiff or its insurance company to do an insurance business and to write insurance in Wisconsin on property in Wisconsin belonging to a Wisconsin citizen in defiance of the Wisconsin laws which were made for the protection of the citizens of the state and which were passed under the police powers of the state and in no way involve interstate commerce within the meaning of the constitution.

If it had involved property rights incidentally, it would not affect the state's right to so control it, for a reasonable police regulation is not invalid because property rights are to some extent affected by it.

Benz v. Kremer, 142 Wis. 1.

It is for the legislature to determine in what cases and upon what conditions the police power may be exercised and its determination will be deemed correct by the court unless it appears to be clearly wrong, and the court will also consider the ostensible purpose of the police regulation as its actual purpose unless the contrary clearly appears.

Benz v. Kremer, 142 Wis. 1;
State ex rel. Kellogg v. Currens, 111 Wis. 431, 438;
St. Louis & S. F. R. R. Co. v. Cross, 171 Fed. 480;
Hooper v. California, 155 U. S. 648.

The insurance laws of Wisconsin are similar to the insurance laws of many of the other states and more comprehensive than some. They were enacted under the police powers of the state for the purpose of protecting its citizens against fraud and deceit by irresponsible and uncontrolled insurance companies, based on the experience of years when such companies and such business was not regulated or controlled by law and because of that fact the security afforded was of but little, if any, value to the insured.

In the case of *Seamans v. The Knapp Stout & Company*, 89 Wis. 171, both the insurance company and the insured were corporations of Wisconsin and existed only by force of the laws of this state. The court said, at page 178:

"* * * Since such laws, of themselves, have no extra-territorial force, these corporations cannot migrate to other states, but must dwell in the state of their creation. * * * While these corporations can only live and have their being in this state, yet

their residence here creates no insuperable objection to their power to contract and be contracted with in other states, *provided they do so in accordance with the laws of such other states.* * * * One of the policies issued by the insurance company covered certain personal property of the defendant located in Iowa, and the other covered certain personal property of the defendant located in Missouri. *The authority of each of those states to prescribe the conditions upon which each of said corporations would be allowed to make contracts and do business therein must be conceded.* (Italics ours.) *State v. U. S. Mut. Acc. Asso.*, 67 Wis. 629; *Stanhilber v. Mut. M. Ins. Co.*, 76 Wis. 291; *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 680. * * *."

In the case of *Seamans v. Zimmerman*, 91 Iowa 366, the Iowa court says that sec. 1144 of the Iowa statutes is directed not merely to the agents as such, but to the companies themselves. They are forbidden to take any risks in this state, either directly or indirectly. The general assembly intended the prohibition to reach as far as its jurisdiction extends. *The power of the legislature of a state to make contracts like those under consideration void, is not questioned.* It was recognized in *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33. Comity does not require the enforcement of a contract valid where made, but in violation of the laws of the state where it is sought to be enforced. The provision of the statute under consideration was designed to protect the property owners of this state from irresponsible insurance companies and the contract in question belonged to the class which the general assembly intended to prohibit. To hold that the company may recover the assessments would be to give it all the benefits which it ever expected to derive from the contract and would be an evident violation of the spirit and the intent of the statute. The contracts are contrary to the policy of this state as expressed in the statute and the courts of this state will not aid the company to enforce them.

Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 886;
American Ins. Co. v. Stay, 41 Mich. 401;
Aetna Ins. Co. v. Harvey, 11 Wis. 394;
Swing v. Munson, 191 Pa. 582.

A contract of insurance on property in Pennsylvania with a foreign insurance company irrespective of where made, is an attempt to do business in Pennsylvania so as to be forbidden by the statutes unless certain conditions are complied with.

Swing v. Munson, 191 Pa. 582.

A contract with a foreign insurance company made in another state in which it is valid, but in direct violation of the laws of the state in which the property is situated and in which the insured resides, will not be enforced in the latter state.

Swing v. Munson, 191 Pa. 582, 58 L. R. A. 223;
Seamans v. Temple Co., 28 L. R. A. 430;
Polk v. Hanke, 28 L. R. A. 568;
Gooch v. Faucett, 39 L. R. A. 835;
Thompson v. Taylor, 54 L. R. A. 585.

An insurance policy is governed by the law of the state in which it is actually delivered to the insured.

Cravens v. N. Y. Life Ins. Co., 148 Me. 583, 53 L. R. A. 305.

This certificate policy was delivered in Wisconsin by the postal department acting as agent of the insurance company which was required to deliver the policy when notified by the Chrysler Sales Corporation of the sale of the automobile.

An insurance company can do business in a state other than that in which it is domiciled only by permission of such state and under such conditions as such state may impose.

Travelers Ins. Co. v Fricke, 41 L. R. A. 557, 99 Wis. 367.

A state can impose upon foreign insurance companies seeking to transact insurance business therein, such terms and conditions as it may deem proper or wholly exclude them.

Daggs v. Orient Ins. Co., 35 L. R. A. 227, 136 Mo. 382, 38 S. W. 85.

That decision was affirmed in 172 U. S. 557.

A state legislature has power to prescribe the conditions upon which insurance companies of other states can do business within their state.

State v. Phillip, 18 L. R. A. 57, 50 Kans. 609;
Parker v. C. Bloenson, 34 L. R. A. 704.

This plaintiff cannot say that the laws of Wisconsin are designed to collect revenues from licensing insurance companies. The amount of the license fee is not the important thing, for it is not large enough to furnish an excuse for any company's refusal to obtain a license. It does not pay the expense of supervision. The reason for the license is the necessity for regulating the business. That was the purpose of the legislature in enacting these laws and this scheme and method of doing business shows very forcibly the necessity for such statutory supervision for none of these purchasers of cars and insurance contracts in Wisconsin know what their insurance contracts are or what they are worth, for they never saw them if the master policy is a part of the contract, for that is in Michigan and the company has never been examined by the insurance commissioner and they say he must not examine them. It says to Wisconsin, we will issue and deliver to your citizens as many insurance policy contracts as we can sell automobiles to your citizens and you keep your hands off.

While a state cannot prevent one of its citizens from going

into another state and buying a contract of insurance in that state, it can forbid the making or delivering, within its borders, of insurance contracts by foreign companies or their agents without its supervision.

State v. J. P. Bass Pub. Co., 20 L. R. A. (N. S.) 495, 71 A. 894.

In the case of *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, the Wisconsin court says that the residence of the companies in Wisconsin creates no insuperable objection to their power to contract and be contracted with in other states, *provided they do so in accordance with the laws of such other states.*

That is all we are asking here. This plaintiff and its insurance company are both nonresidents of Wisconsin and they are asking the aid of a court of equity to force their Chrysler-Palmetto method of insurance into the state of Wisconsin without any license and without any supervision by its officers, in defiance of the laws of the state which were made for the protection of its citizens. We submit it should not be aided in so doing by a court of equity.

If this insurance company is a responsible company and will do a legitimate insurance business, it can obtain a license therefor under the laws of Wisconsin the same as any other insurance company by submitting itself to the jurisdiction, examination and supervision of the proper officers of the state.

Plaintiff claims that the supervisory provisions of our insurance statutes are unconstitutional. We reply that this is a police power and no corporation, and especially no foreign insurance corporation has any constitutional right to come into our state and swindle or defraud the citizens of our state, and for that reason we confidently assert that any reasonable regulation and supervision by the state to prevent such a result is proper regulation. Cheap insurance may be no insurance at all, or dear at

any price, so a state may require a reasonable rate to be charged and a reasonable protection to be furnished and a suitable remedy for its enforcement in the state.

Selling insurance is not like selling ordinary goods or property, for that is bought for the value in the articles or property sold, while insurance is only valuable because of the form and conditions of the contract and the responsibility of the company issuing it.

The man who buys one of these insurance contracts in Wisconsin as a part of his automobile purchase does not know when he receives this certificate insurance policy what his full contract is if the provisions of the so-called master policy are a part of his insurance contract, as they now claim, for that so-called master policy is in Detroit, Michigan, and he does not know whether this company is solvent or insolvent, because it has not been examined, and appellant says because this insurance company was created by South Carolina, the insurance commissioner of Wisconsin has no right to help him find out whether his insurance is good or bad.

Before Wisconsin had any statutes prescribing the manner of doing insurance business and providing for supervision by the insurance commissioner of such business and companies, there were all sorts of so-called wild-cat insurance schemes in Wisconsin and, of course, the more irresponsible the insurer, the more attractive insurance contract it could make, and our statutory provisions regulating the business were born out of that experience, as stated by Justice Winslow in *Rose v. Kimberly-Clark Co.*, 89 Wis. 545, and they were designed to furnish to the insured citizens needed protection from such irresponsible companies and from valueless insurance contracts.

Clearly, the purchaser of an insurance policy contract has no way of investigating for himself as to the responsibility of the company, or the relative value of insurance contracts, so the

state imposed upon the insurance commission the duty to make the necessary investigation as to the responsibility of insurance companies before they are permitted to do business in the state and to require that such business be done in the manner prescribed by the statutes.

Counsel claim these regulatory provisions are unnecessary, unreasonable and unconstitutional, but clearly they are police regulations for the protection of the insured citizens of the state and were considered by the legislature as reasonably necessary to prevent fraud, and to protect the citizens of the state as they cannot make the necessary investigations for themselves. We submit that under the decisions this foreign insurance company has no constitutional right to do such business in this state, for it is doing a special kind of confidence business and all the right it has it gets from the state of South Carolina, which created it, and whatever rights it has or gets in Wisconsin, it must get from Wisconsin and for that reason, Wisconsin can make such terms as from the experience of years in dealing with such companies and business, it has found to be necessary for the proper protection of its citizens against irresponsible insurance companies and cheap or worthless schemes and contracts, and the courts should not in the exercise of their equity jurisdiction furnish any protection to this plaintiff in carrying on this illegal conspiracy to defeat the laws of Wisconsin or help it to force its lawless schemes and method of doing business in Wisconsin.

This insurance company has the same right as any other insurance company to come into the state and ask for a license if it wants to do this insurance business in the state and if it can qualify to do such business under the laws of the state it can get a license to do business in the same way any other company does, and we submit, if it cannot so qualify or is unwilling to do business as required by law, then it should not have the assistance of a court of equity to force its pretended insurance upon our citizens.

We have now received appellant's brief and we think no new questions have been raised.

The opinion of the circuit court of Dane county, Wisconsin, in the cases of *Bristol & Co. v. Railroad Commission of Wisconcin, decided* July 19, 1926, is cited as sustaining the right to carry on this insurance business in Wisconsin without a license, but those cases involved the right of Bristol & Co., a resident of Illinois, to sell mortgage bond securities in Wisconsin that had endorsed thereon a guarantee of payment by an insurance company of that state and licensed there, but not in Wisconsin and the Insurance Commissioner of Wisconsin objected to the railroad commission's authorizing such sale without the approval of the Insurance Commissioner under the provisions of sec. 189.10 (2) of the Wisconsin statutes, which provides that:

> "No permit shall be issued for the sale of securities of an insurance company or of a company whose business consists chiefly in owning or controlling the securities of insurance companies, without the approval of the insurance commissioner. * * *"

That, we submit, is not the question here for those were securities of:

1. Bonds and securities of the Hostelry Corporation of Kankakee,
2. Bonds and securities of the M. & H. Theatres Corporation,
3. Bonds and securities of the Wilson Building Corporation,
4. Bonds and securities of the Marquette Court Building Corporation.

Those cases are all appealed to the state supreme court, but they are not under this statute, for they all involve the provisions of sec. 189.10 (2) of ch. 189, which is the securities chapter, while this case involves the regulatory provisions of ch. 201, relating to insurance.

On pages 62 and 63 of appellant's brief it is argued:

> "The attempt of the States of Wisconsin and Maine through their commissioners of insurance to prevent the retail sale of Chrysler cars by dealers in those states and because those dealers purchased the cars at wholesale in interstate commerce from Chrysler who had made a contract of insurance in respect to them is in effect an attempt by the state to place a burden on inter-state commerce under the guise of regulating intra-state business."

Clearly we are not preventing Chrysler from selling automobiles either inter- or intra-state, but we are attempting to prevent the sale of unauthorized insurance in Wisconsin to our citizens without any supervision by the state. Suppose Chrysler as an aid or inducement to the sale of Chrysler cars in Wisconsin advertised that instead of furnishing insurance policies with each car the radiator of each Chrysler car sold in Wisconsin was filled with whiskey, or that to each purchaser of a Chrysler car in Wisconsin they would deliver by mail a gallon of whiskey instead of this insurance policy, would it be claimed that the state could not legislate for the protection of its citizens against such a scheme to evade the laws of the state? Laws should not be construed so as to promote lawlessness.

There are numerous statements made and questions discussed in appellant's brief that might be explained, denied, or distinguished from the facts in this case, but we believe the general principles are all sufficiently covered by the general discussion and the authorities already cited in this brief, and in the opinion of the court.

We submit the decision of the lower court was right and should be affirmed.

Respectfully submitted,

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